Supreme Court, U. S.
FILED
SEP 2 1975
MICHAEL RODAK, JR., CLERK

No. 74-1396

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

MICHELIN TIRE CORPORATION,

Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

AMICI CURIAE BRIEF

For: County of Los Angeles; The Cities of Houston, Texas and Long Beach and Glendale, California; The California Counties of Alameda, Butte, Fresno, Humboldt, Kern, Marin, Monterey, Orange, Riverside, Sacramento, Sonoma, Tulare, Tuolumne, and Yolo; E. C. Williams, San Diego County Assessor; Philip E. Watson, Los Angeles County Assessor; and the City and County of San Francisco, California

JOHN H. LARSON,
Los Angeles County Counsel
JAMES DEXTER CLARK,
Deputy County Counsel
648 Hall of Administration
Los Angeles, California 90012
(213) 974-1889

Of Counsel (see next page)

Of Counsel

Jonathan Day, Houston City Attorney
Leonard Putnam, Long Beach City Attorney
Richard W. Marston, Glendale City Attorney
Richard J. Moore, Alameda County Counsel
James F. May, Deputy County Counsel
Daniel V. Blackstock, Butte County Counsel
Robert M. Wash, Fresno County Counsel
Raymond W. Schneider, Humboldt County Counsel
Ralph B. Jordan, Kern County Counsel
Forest Greber, Deputy County Counsel
Douglas J. Maloney, Marin County Counsel
William H. Stoffers, Monterey County Counsel
Henry I. Jorgensen, Deputy County Counsel
Adrian Kuyper, Orange County Counsel
Laurence M. Watson, Deputy County Counsel
Ray T. Sullivan, Jr., Riverside County Counsel
Loyal E. Keir, Deputy County Counsel
John B. Heinrich, Sacramento County Counsel
Monte L. Fuller, Deputy County Counsel
Stanford D. Herlick, San Bernardino County Counsel
William Sabourin, Deputy County Counsel
George P. Kading, Santa Barbara County Counsel
Dana D. Smith, Assistant County Counsel
William M. Siegel, Santa Clara County Counsel
Byron D. Athan, Deputy County Counsel
Robert A. Rehberg, Shasta County Counsel
James P. Botz, Sonoma County Counsel
Thomas B. Sawyer, Deputy County Counsel
Calvin E. Baldwin, Baldwin, Tulare County Counsel
Walter L. McArthur, Deputy County Counsel
Robert L. Felts, Deputy County Counsel
Stephen Dietrich, Jr., Tuolumne County Counsel
Charles R. Mack, Yolo County Counsel
Walter I. Colby, Chief Deputy County Counsel
Robert G. Berrey, San Diego County Counsel
Joseph Kase, Jr., Chief Deputy County Counsel
Thomas M. O'Connor, San Francisco City Attorney
John J. Doherty, Deputy City Attorney

Staff Assistants:

Gregory Bistline
Joseph Grant
Arthur Lew
Alfred Munoz

No. 74-1396

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

MICHELIN TIRE CORPORATION,

Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

AMICI CURIAE BRIEF

For: County of Los Angeles; The Cities of Houston, Texas and Long Beach and Glendale, California; The California Counties of Alameda, Butte, Fresno, Humboldt, Kern, Marin, Monterey, Orange, Riverside, Sacramento, Sonoma, Tulare, Tuolumne, and Yolo; E. C. Williams, San Diego County Assessor; Philip E. Watson, Los Angeles County Assessor; and the City and County of San Francisco, California

JOHN H. LARSON,
Los Angeles County Counsel
JAMES DEXTER CLARK,
Deputy County Counsel
648 Hall of Administration
Los Angeles, California 90012
(213) 974-1889

Of Counsel (see next page)

Of Counsel

Jonathan Day, Houston City Attorney
Leonard Putnam, Long Beach City Attorney
Richard W. Marston, Glendale City Attorney
Richard J. Moore, Alameda County Counsel
James F. May, Deputy County Counsel
Daniel V. Blackstock, Butte County Counsel
Robert M. Wash, Fresno County Counsel
Raymond W. Schneider, Humboldt County Counsel
Ralph B. Jordan, Kern County Counsel
Forest Greber, Deputy County Counsel
Douglas J. Maloney, Marin County Counsel
William H. Stoffers, Monterey County Counsel
Henry I. Jorgensen, Deputy County Counsel
Adrian Kuyper, Orange County Counsel
Laurence M. Watson, Deputy County Counsel
Ray T. Sullivan, Jr., Riverside County Counsel
Loyal E. Keir, Deputy County Counsel
John B. Heinrich, Sacramento County Counsel
Monte L. Fuller, Deputy County Counsel
Stanford D. Herlick, San Bernardino County Counsel
William Sabourin, Deputy County Counsel
George P. Kading, Santa Barbara County Counsel
Dana D. Smith, Assistant County Counsel
William M. Siegel, Santa Clara County Counsel
Byron D. Athan, Deputy County Counsel
Robert A. Rehberg, Shasta County Counsel
James P. Botz, Sonoma County Counsel
Thomas B. Sawyer, Deputy County Counsel
Calvin E. Baldwin, Baldwin, Tulare County Counsel
Walter L. McArthur, Deputy County Counsel
Robert L. Felts, Deputy County Counsel
Stephen Dietrich, Jr., Tuolumne County Counsel
Charles R. Mack, Yolo County Counsel
Walter I. Colby, Chief Deputy County Counsel
Robert G. Berrey, San Diego County Counsel
Joseph Kase, Jr., Chief Deputy County Counsel
Thomas M. O'Connor, San Francisco City Attorney
John J. Doherty, Deputy City Attorney

Staff Assistants:

Gregory Bistline
Joseph Grant
Arthur Lew
Alfred Munoz

TOPICAL INDEX

	Page
Table of Authorities	vi
SUMMARY OF ARGUMENT	1
INTRODUCTION	3
POINT 1	
THE PROBLEM	4
POINT 1a	
FOR THE STATES AND LOCALITIES CHOSEN BY IMPORTERS/DISTRIBUTORS AS THEIR DISTRIBUTION POINT	4
POINT 1b	
IMPORTERS' REPLY	7
POINT 2	
THE POLICIES BEHIND THE IMPORT-EXPORT CLAUSE	11
POINT 3	
THE HISTORICAL CONTEXT OF BROWN v. MARYLAND REVEALS THAT (1) THE GOODS IN THAT CASE WERE IN TRANSIT AND (2) JUSTICE MARSHALL APPROVED OF TAXING IMPORTS ON A NONDISCRIMINATORY BASIS.	19

POINT 4

THE IMPORT-EXPORT CLAUSE WAS NEVER MEANT TO APPLY TO AD VALOREM PROPERTY TAXES 29

POINT 4a

THE IMPACT OF LATER EXTENSIONS OF THE IMPORT-EXPORT CLAUSE 36

POINT 5

THE EFFECT OF APPLYING THE ABOVE ANALYSIS TO THIS CASE WILL BE TO MAKE THE ORIGINAL PACKAGE TEST MORE MEANINGFUL 42

POINT 6

OTHER METHODS OF CONSTITUTIONAL INTERPRETATION LEAD TO THE CONCLUSION THAT DISCRIMINATING AGAINST UNITED STATES RESIDENTS, DOMESTIC PRODUCERS AND INTERSTATE IMPORTERS IS INCONSISTENT WITH THE REST OF THE DOCUMENT 44

POINT 6a

CONSTRUCTION OF ARTICLE 1, § 10 CLAUSE 2, SO AS TO PROHIBIT A NONDISCRIMINATORY AD VALOR-

EM TAX WOULD VIOLATE THE TENETS OF EQUAL PROTECTION AND THUS CREATE AN INTERNAL CONSTITUTIONAL INCONSISTENCY 45

POINT 6b

THE POWER OF PROPERTY TAXATION, RESERVED TO THE STATES BY THE TENTH AMENDMENT, WHEN VIEWED IN HISTORICAL PERSPECTIVE, ALLOWS NONDISCRIMINATORY TAXATION ON IMPORTED GOODS 49

POINT 6c

ARTICLE 1, § 10, CLAUSE 2, SHOULD BE INTERPRETED SO AS TO BE CONSISTENT WITH ARTICLE 1, § 9, CLAUSE 5 51

POINT 6d

ARTICLE 1, § 10, CLAUSE 2, SHOULD BE INTERPRETED CONSISTENTLY WITH ARTICLE 1, § 10, CLAUSE 3 53

POINT 7

THE APPLICATION OF YOUNGSTOWN SHEET AND TUBE CO v. BOWERS, SUPRA, TO THIS CASE IS PROPER 55

POINT 8

THE EFFECT OF APPLYING YOUNGSTOWN TO THIS CASE WILL BE TO ACHIEVE THE PURPOSES OF ARTICLE 1, § 10, CLAUSE 2 AND TO LESSEN THE DISCRIMINATION AGAINST DOMESTIC PRODUCERS AND UNITED STATES RESIDENTS 58

POINTS 1-8

CONCLUSION 60

POINT 9

THE TESTS PROPOSED BY THE PETITIONER DO NOT SERVE THE PURPOSES OF THE CONSTITUTION 62

POINT 9a

THE PROPOSED ORIGINAL FORM "DOCTRINE" IS NOT SUPPORTED BY LOGIC OR BY BROWN v. MARYLAND 63

POINT 9b

THE "FLOWING" OF THE GOODS DOES NOT SUPPORT THEIR IMMUNITY 65

POINT 9c

THE POSITION THAT THE GOODS MUST BE IN THE HANDS OF THEIR

"ULTIMATE" USER BEFORE A NON-DISCRIMINATORY TAX MAY BE APPLIED IS NOT SUPPORTED BY ANY CASE 66

POINT 9d

THE SIZE OF SHIPMENTS OR SALES SHOULD NOT DETERMINE WHETHER THE IMPORT-EXPORT PROHIBITION SHOULD APPLY 68

POINT 9e

THE SEA VAN SHOULD PLAY A ROLE IN THE EVIDENTIARY DETERMINATION MADE PURSUANT TO BROWN v. MARYLAND 69

POINT 10

CONCLUSION 72

TABLE OF AUTHORITIES

Cases	Page
Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 22 L.Ed.2d 344 89 S.Ct. 1109	50
Brown v. Maryland, 25 U.S. (12 Wheat) 419, 6 L.Ed. 678	1, 2, 3, 4, 7, 8, 9 12, 13, 15, 16, 18 19, 20, 25, 27, 30 34, 35, 37, 39, 41 42, 43, 51, 56, 58 61, 62, 63, 64, 66 69, 72
Bullock v. Carter, 405 U.S. 135, 31 L.Ed. 92, 92 S.Ct. 849	48
Burke v. Wells, 208 U.S. 14, 52 L.Ed. 370, 28 S.Ct. 193	12, 16, 56
Carson Petroleum Co. v. Vial, 279 U.S. 95, 73 L.Ed. 626 49 S.Ct. 292	9, 17
Case v. Bowles, 327 U.S. 92, 90 L.Ed. 552, 66 S.Ct. 438	49
City and County of Denver v. Denver Publishing Co., 153 Colo. 539, 387 P.2d 48	59
City of Galveston v. Mexican Petroleum Corporation. [D.C. Texas 1926] 15 Fed.2d 208	8
Clyde Mallory Lines v. Ala., 296 U.S. 261, 80 L.Ed. 215. 56 S.Ct. 194	9, 12, 13, 15 53, 54, 56

Cook v. Marshall County,
119 Iowa 384, 93 N.W. 372,
aff'd 196 U.S. 261, 49 L.Ed. 471,
23 S.Ct. 233 — 71

Cook v. Pennsylvania,
97 U.S. 566, 24 L.Ed. 1015 — 16, 35

Department of Revenue v. James B. Beam
Distilling Company,
377 U.S. 341, 12 L.Ed.2d 361,
84 S.Ct. 1247 — 29, 59

Farmer's Rice Cooperative v. County of Yolo,
14 Cal.3d 16, 122 Cal.Rptr. 65,
536 P.2d 465 — 17

Frontiero v. Richardson,
411 U.S. 677, 36 L.Ed.2d 583,
93 S.Ct. 1764 — 48

Hart v. County of Los Angeles,
Los Angeles Superior Court No. C. 83087 — 26, 27

Hooven & Allison v. Evatt,
324 U.S. 652, 89 L.Ed. 1251,
65 S.Ct. 870 — 8, 25, 42, 41

Kotch v. Board of River Port Pilot Comm'rs,
330 U.S. 652, 91 L.Ed. 211,
67 S.Ct. 504 — 47

Licenses Cases,
46 U.S. [How.] 504, 12 L.Ed. 256 — 25, 37

Low v. Austin,
80 U.S. (13 Wall.) 29, 20 L.Ed. 517 — 8, 19, 20, 23
38, 39, 40, 59, 69

Low v. Austin,
1 Calif. Unreported Cases 642 — 20, 22

Lubin v. Panish,
416 U.S. 709, 39 L.Ed. 702,
94 S.Ct. 1315 48

May v. New Orleans,
178 U.S. 496 44 L.Ed. 1165,
20 S.Ct. 976 22, 58, 64, 70

Mexican Petroleum Corp. v. South Portland,
121 Me. 128, 115 A. 900 8

Michelin Tire Corp. v. Board of County
Commissioners etc., et al.,
[Dist. Court of Johnson County (1975)]
Nos. 54594, 56432, 58006, 59905 23, 24

Michigan State Tax Commission v. Garment
Corporation of America,
32 Mich.App. 715, 189 N.W.2d 72,
cert. den. 404 U.S. 992, 30 L.Ed.2d 544,
92 S.Ct. 538 70, 71

Minnesota v. Blasius,
290 U.S. 1, 78 L.Ed. 131,
54 S.Ct. 34 5, 9, 17, 25, 74

Peck v. Lowe,
247 U.S. 165, 62 L.Ed. 1049,
38 S.Ct. 432 51, 52

Phila. & Reading R. Co. v. Pennsylvania,
82 U.S. (15 Wall.) 284,
21 L.Ed. 164 47

Richfield Oil Company v. State Board of
Equalization,
329 U.S. 69, 91 L.Ed. 80,
67 S.Ct. 156 32, 33

E. J. Stanton & Sons v. County of Los Angeles,
78 Cal.App. 2d 181, 177 P.2d 804,
cert. den. 323 U.S. 766, 92 L.Ed. 352,
68 S.Ct. 75 7, 68, 71

United States v. Classic,
313 U.S. 299, 85 L.Ed. 1368,
61 S.Ct. 1031 48

U.S. v. Darby,
312 U.S. 100, 85 L.Ed. 609,
61 S.Ct. 451 49

Volkswagen Pacific, Inc. v. City of Los Angeles,
7 Cal.2d 48, 101 Cal.Rptr. 869,
496 P.2d 1237 7, 8, 71

W. P. and Cin. Trans. Co. v. Wheeling,
99 U.S. 273, 25 L.Ed. 412 50

Woodruff v. Parham,
75 U.S. [8 Wall.] 123,
19 L.Ed. 382 9, 16, 19, 31, 32
38, 39, 40

Youngstown Sheet & Tube Co. v. Bowers,
358 U.S. 534, 3 L.Ed.2d 490,
79 S.Ct. 383 2, 4, 11, 12, 13
18, 25, 27, 42, 55
56, 57, 58, 59, 60
61, 66, 68, 74

Constitutions

U.S. Constitution:

Preamble, Part II, Article III, Paragraph 2 26

Article 1, Sec. 8 30

Article 1, Sec. 9, Clause 2 51

Article 1, Sec. 9, Clause 5 2, 9, 33, 51, 52

Article 1, Sec. 10 12, 46, 47, 49

Article 1, Sec. 10, Clause 2 1, 2, 4, 14, 33, 46
47, 48, 50, 51, 53, 58

U.S. Constitution:

Article 1, Sec. 10, Clause 3	2, 9, 13, 53
Fifth Amendment	2, 26
Tenth Amendment	2, 26

Statutes

19 U.S.C.A. Sec. 1202	3 5, 15
Connecticut Statutes - 1821	28
Delaware Laws 1827-1829	28
Georgia Laws 1827-1828	28
Maine Revised Statutes 1841	28
Maryland Statutes 1692-1839	28
Massachusetts Statutes 1823	28
Massachusetts Statutes 1822-1835	28
New Hampshire Laws 1822-1827	28
New York Laws - Revised 1829	28
North Carolina Laws 1827-1818	28
North Carolina Laws 1829-1832	28
Pennsylvania Laws 1700-1830	28
Rhode Island Public Laws 1822-1842	28
South Carolina Statutes, Vol. 6, 1814-1838	28
Vermont Statutes 1824; Statutes at Large Virginia 1831-1832	28

Textbooks

Politics and The Constitution in the History of the United States, Crossky (1953), Chicago University Press. pp. 295-323 — 14, 20, 30, 32, 36, 38, 50

Elliot's, Debates 2d Ed. 483 — 33

Taxation in American States and Cities, Ely — 28, 35

The Federalist No. 42 — 33

2 Madison Debates, 192 and 195 — 31

2 Madison Debates, 192, 196 — 14

Martin, Debates, pp. 51 — 30

Murr, Export/Import Traffic Management and Forwarding, p. 3-7 — 22

Snow, Treaties and Topics in American Diplomacy — 26

Containerisation, A Modern Transport System, Vandenberg — 23, 24

Understanding Today's Distribution Center, p. 2, Ackerman — 22, 69

Periodicals

A Century of Dissent: The Immunity of Goods Imported for Resale from Nondiscriminatory State Personal Property Taxes, 7 Southwestern Law Review 247, Summer 1975, p. 270 — 5

Prof. Melvin G. Dakin,
"The Protective Cloak of the Export - Import Clause! Immunity for the Goods or Immunity for the Process" [1958] 19 La. Law Review 747-776 — 67, 69, 74

Early & Weitzman,
A Century of Dissent: The Immunity of Goods Imported for Resale from Nondiscriminatory State Personal Property Taxes 7 - Southwestern Law Review 247, Summer 1975 — 4, 5, 12, 14 20, 30, 32

The Supreme Court, 1958 Term,
73 Harvard Law Review 84, p. 178,
Prof. Henry M. Hart, Jr. — 12, 20, 30, 55, 74

Prof. Thomas Reed Powell,
State Taxation of Imports - When Does an Import Cease to Be an Import, 58 Harvard Law Review 858 — 12, 14, 20 30, 32, 74

No. 74-1396

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1974

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,
Respondents.

AMICI CURIAE BRIEF

SUMMARY OF ARGUMENT

The states and their local governments are presently confronted with the fact that their residents and domestic manufacturers are discriminated against in favor of importer distributors. The Petitioner's proposals to this Court magnify that discrimination, in that no property tax may be assessed in the state which the importer chooses for a distribution center, until the goods are sold.

Article I §10 Clause 2 prohibits imports and duties, but not other forms of taxes. A study of commerce and taxation in effect in 1827 reveals that *Brown v. Maryland* (1827)

25 U.S. (12 Wheat)419, 6 L.Ed. 678 prohibited only discriminatory taxes and that the original package "doctrine" was applied only to goods awaiting immediate transportation inland. The later extrapolation of the original package idea was the result of a failure to review the historical setting of the opinion in that case and the policies behind the Constitutional provisions. Those policies do not support the discrimination practiced against distributing states' residents and producers.

Applying principles of Constitutional interpretation to prohibiting the states from taxing any of the goods in this case, indicates that the discrimination creates an inconsistency between Article I § 10 Clause 2 and the Fifth Amendment. Prohibiting such taxes is contrary to the Tenth Amendment. Interpretation of Article I §9 Clause 5, of Article I § 10 Clause 3, and of different provisions of Article I §10 Clause 2, are wholly inconsistent with interpreting the Import-Export Clause so as to prohibit the taxation of any of the goods.

Youngstown Sheet & Tube Co. v. Bowers (1959) 358 U.S. 534, 3 L.Ed.2d 490, 79 S.Ct. 383, if applied to this case, would serve the purposes of the Import-Export Clause and would partially reduce the discrimination. There is no distinction between the facts of that case and the facts of this one (as related to both packaged and unpackaged goods) which in any way affects the policies of the Constitution.

The Petitioner's "original form doctrine" magnifies the discrimination and is not supported by *Brown v. Maryland, supra.* In fact, the Petitioner advocates the rule that bulk goods must be sold or used before they may be taxed. The "original package" was meant to be the shipping package. If there is an "original form doctrine," it should be the "shipping form." Sea vans, or cargo containers, as means of sending the goods from the foreign manufacturer to the point where the goods are to be readied for sale, have an evidentiary role to play.

The process of importation has ended and that of domestic commerce has begun. Even under the most restrictive interpretation of the states' ability to act, a nondiscriminatory tax should be levied at this point.

INTRODUCTION

This case involves a claim for tax refund brought by an importer/distributor. Its goods, both packaged and unpackaged, arrive at the inland town which serves as its distribution center for the six southeastern states. From that point, the goods are sold to the importing company's franchisees in those states. Although the Petitioner has directed the Court's attention only to the question of the tires arriving

in bulk, it is clear that raising any question regarding Article I. § 10, Clause 2, of the United States Constitution involves several problems. Many of these have been discussed by various Courts. With the exception of the decision in *Youngstown Sheet & Tube Company v. Bowers* (1959) 358 U.S. 534, 3 L.Ed.2d 490, 79 S.Ct. 383, very little attention has been paid to the policies behind the Import-Export Clause, the meaning of the words used therein, and the context and language of the case which first interpreted its effect on imports. *Brown v. Maryland* (1827) 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678.

POINT I

THE PROBLEM

POINT Ia

FOR THE STATES AND LOCALITIES CHOSEN BY IMPORTERS/DISTRIBUTORS AS THEIR DISTRIBUTION POINT

Local governments are facing a crucial dilemma in 1975. They rely largely on ad valorem property taxes to pay their costs (Early & Weitzman, *A Century of Dissent: The Immunity of Goods Imported for Resale from Nondiscriminatory State Personal Property Taxes* 7 Southwestern Law

Review 247, Summer 1975, at page 270). The people of Lawrenceville, Georgia and of Gwinnett County, for instance, must pay for the services which the county renders, including police, courts, jails, road building and maintenance, and fire protection. This is as it should be. But in addition, they must pay for this protection for the importers who may have chosen Lawrenceville as a distribution center because those importers, under the ruling of the Supreme Court of Georgia, do not have to pay any taxes on goods which are contained in cardboard boxes. Petitioner here asserts that it is also not liable for taxes on its tires. The local residents must pay for these services, even though the police and fire departments protect the goods and the roads help speed them on their way once they are sold. None of these costs are paid for by the customs duties which importers may have to pay to the Federal Government. In fact, in many cases, no duty is required at all (19 USCA § 1202).

The residents are not the only people who pay to protect imported goods. The domestic and out-of-state manufacturers, who transport their goods to Lawrenceville either for sale or for distribution, even out-of-state, must pay taxes on their goods (cf. *Minnesota v. Blasius* [1933] 290 U.S. 1, 78 L.Ed. 131, 54 S.Ct. 34). This inequality has two effects: first, the domestic producer must pay part of the importer's cost of protecting his goods; second, the domestic producer's costs rise whereas the importer/distributor's do not.

At the same time, the local residents receive precious few of the benefits which come as a result of this largesse. To be sure, some of the residents of this locality may be able to buy these imported tires at lower prices than if all of the people of the taxing jurisdiction had not supported the importer/distributor's operation. Considering the amount of money paid by the individual who does pay his fair share of the tax burden, this saving is minimal.

There are, in actuality, two classes of people who may benefit greatly from this windfall: The first, of course, is the importer himself who is able to sell more of his goods than the domestic manufacturer of the same goods because his prices may be lower, since he does not have to pay the same property taxes as the domestic manufacturer must. The second person who benefits is the buyer of the tires who does *not* live in the taxing jurisdiction. He is able to buy his products at a reduced price, without having to pay taxes to support the importer/distributor.

It may well be that even this unequal benefit to the out-of-state buyer is illusory. The importer may just as easily maintain his prices to the retail buyer and retain the benefits of lower costs. Of course, passing the savings on or retaining profits is usually a decision based upon the importer/distributor's share of the market, his stockholders, income taxes, and other like considerations.

It is clear that this Court's decision in this case, whatever the result, will effect this dilemma. It will either resolve it or increase it, and it will also effect a substantial amount of money. Los Angeles County alone will loose $15,000,000.00 per year if the efficacy of *Volkswagen Pacific, Inc. v. City of Los Angeles* (1972) 7 Cal.2d 48, 101 Cal.Rptr. 869, 496 P.2d 1237, is cast in doubt, and an unascertained amount if *E.J. Stanton & Sons v. County of Los Angeles* (1947) 78 Cal.App.2d 181, 177 P.2d 804, cert. den. 323 U.S. 766, 92 L.Ed. 352, 68 S.Ct. 75, is overruled. The Court's decision will also effect the 120 cases now pending on this issue before the Superior Court of Los Angeles County, as well as the four cases presently before the Courts of Appeal on this issue. In addition revenue will be affected in the other Amici's territories, both inland localities and large consumer areas.

POINT Ib

IMPORTER'S REPLY

It is almost automatic for the importer/distributor to point to what has been termed the "original package doctrine" in reply to the dilemma of the local governments. The Petitioner herein refers to an "original form doctrine." The idea behind both, however, is the same. It rests upon one-half sentence in *Brown v. Maryland, supra,* which states:

> ". . . but while remaining the property of the importer, in his warehouse, in which it was imported, a tax upon it is too plainly a duty upon imports to escape the prohibition in the Constitution." (25 U.S. at page 441, 6 L.Ed. at page 686.)

Cases since the end of the Nineteenth Century have construed this sentence to mean that any imported goods which are sealed in a box, which are held in *any* warehouse belonging to an importer, are considered to be free from *all* taxes. (See *Low v. Austin* (1871) 80 U.S. (13 Wall.) 29, 20 L.Ed. 517, and *Hooven & Ellison v. Evatt* (1946) 324 U.S. 652, 89 L.Ed. 1251, 65 S.Ct. 870).

This has not always been so true in the case of goods which arrive in bulk (cf. *Mexican Petroleum Corp. v. South Portland* [1922] 121 Me. 128, 115 A. 900; *City of Galveston v. Mexican Petroleum Corporation* [D.C. Texas 1926] 15 Fed.2d 208; *Volkswagen Pacific, Inc. v. City of Los Angeles, supra,* as well as cases cited by Petitioner). Nevertheless, the warehouse of the importer has achieved a certain status as a sanctuary wherein the local authorities may not tread.

It is clear, however, that it is the warehouse of the importer of foreign goods which is clothed with this characteristic. The Courts have treated warehouses and distributorships

belonging to domestic producers and "importers" from other states quite differently, allowing the taxing authorities to tax those goods in a nondiscriminatory fashion when they come to rest in the state and are at the disposal of the owner for his own purposes (Cf. *Woodruff v. Parham* [1869] 75 U.S. [8 Wall.] 123, 19 L.Ed. 382, and *Minnesota v. Blasius* [1933] 290 U.S. 1, 78 L.Ed. 131, 54 S.Ct. 34). It is clear that the warehouse of the exporter has no such sanctity. Usually, if commitment to an actual mode of transit has not been made, the goods of the exporter are taxable (cf. *Carson Petroleum Co. v. Vial* (1928) 279 U.S. 95, 73 L.Ed. 626, 49 S.Ct. 292, and U.S. Constitution Art. I §9 Cl. 5).

Even before imported goods arrive at the warehouse, they are subject to nondiscriminatory tonnage duties which have a basis in services (cf. Art. I §10 Cl. 3; *Clyde Mallory Lines v. Ala.* [1935] 296 U.S. 261, 80 L.Ed. 215, 56 S.Ct. 194).

Many Courts have gone no further than that one-half sentence in *Brown v. Maryland, supra.* But it is apparent that in the face of the dilemma which is confronting the local taxing authorities, there must be some explanation beyond this.

The Petitioner has attempted to do so. It justifies applying the Import-Export prohibition on the following grounds:

1. The importer has a right to sell his goods without being taxed, because he has paid customs

duties (Brief for the Petitioner [hereafter B.P.], pp. 9 and 11);

2. The goods, despite the right bought by paying duties, are taxable, but only at their "final destination" (B.P., p. 10);

3. A nondiscriminatory tax will discriminate against consumers in inland states (B.P., p. 10);

4. Paying local taxes for services and the federally imposed duties puts the importer at a disadvantage vis-a-vis domestic manufacturers; i.e., the duty was meant to replace local taxtaion (B.P., p. 12).

The Petitioner has set forth other arguments supporting its position. But they are not relevant to the policies to be achieved by the Import-Export Clause, and will be discussed later. Petitioner has actually introduced the two basic policies behind the Import-Export Clause:

1. The Import-Export Clause was meant to prevent the importing states from laying a tax on the nonimporting states, which would discriminate against them (Petitioner's reasons 2 and 3, supra);

2. The Federal Government has sole charge of foreign and interstate commerce, and the states should not interfere with that (Petitioner's reasons 1 and 4, supra).

POINT 2

THE POLICIES BEHIND THE IMPORT-EXPORT CLAUSE

The first policy of the Import-Export prohibition was noted by the Court in *Youngstown Sheet & Tube Co. v. Bowers, supra.*

> "The design of the constitutional immunity was to prevent '[t]he great importing states [from laying] a tax on the nonimporting states,'. . . which would not only discriminate against them but also 'would necessarily produce countervailing measures on the part of those states whose situation was less favorable. . .'"
> (358 U.S. at p. 545; 3 L.Ed.2d at p. 498; 79 S.Ct. at p. 389.)

The Petitioner has argued that this discrimination is any increase in price to an inland consumer. The following characterization of the reason for the inclusion in the Federal Constitution of the Import-Export prohibition makes the Petitioner's contentions clear:

> "One of the important reasons for the inclusion in the Federal Constitution of the Import-Export Clause was the desire to prevent the seaboard states from levying taxes on goods flowing through to

inland states." (2 Farrand, Records of the Federal Convention [1911], 441, 442. [B.P. p. 10].)

It is clear, however, that this is not what was meant. First, the purpose of the Import-Export Clause was not to prevent any tax, but only imposts and duties, i.e., those actually discriminating against imports (see discussion, infra; Prof. Henry M. Hart, Jr. *The Supreme Court, 1958 Term*, 73 Harvard Law Review 84 at page 178; and Prof. Thomas Reed Powell *State Taxation of Imports -- When Does an Import Cease To Be an Import*, 58 Harvard Law Review 858; Early & Weitzman, *supra*. Second, interpretations of Article I §10 prohibitions have allowed some state taxation of goods which may be bound to "inland" states (cf. *Burke v. Wells* [1908] 208 U.S. 14, 52 L.Ed. 370, 28 S.Ct. 193; *Clyde Mallory Lines v. Alabama, supra;* and *Youngstown Sheet & Tube Co. v. Bowers, supra).* These taxes may not be similar to the tax in question in other ways (they may technically be imposed before or after the opening of any of the goods' packages or the sale of the goods). But in their burden upon the inland consumer they are the same. Third, it is apparent that the itinerant peddler and the auctioneer, whose goods are taxable under *Brown v. Maryland, supra,* could easily sell in another state or to a consumer from another state after being taxed in their own state. Taxes imposed pursuant to *Brown v. Maryland,* therefore, may result in higher prices on out-of-state goods.

It is clear from the above that the purpose of the Import-Export Clause was not to prohibit *any* price increase which would result from coastal state taxation. In fact, it makes sound economic sense that the consumer should pay the costs of getting the goods to him. To oblige the consumer to pay for police protection of the goods he buys is no less sensible than obliging him to pay for the services of the truck driver or the night watchman who bring the goods safely to him. The only difference is that a government collects part of the cost. This difference did not effect the outcome of an analogous case involving tonnage duties, specifically prohibited by Article I § 10, Clause 3 (*Clyde Mallory Lines v. Alabama, supra*).

What, then, is the purpose of the immunity regarding discrimination against inland states? Clearly, as set forth in *Youngstown Sheet & Tube Co. v. Bowers, supra*, the purpose is to avoid discrimination. Discrimination does not mean that the coastal state may not treat the goods at all, but means that it must treat them all equally. "To make distinctions in treatment" is the definition given by Webster's *New World Dictionary of the American Language* (World Publishing Co., 1958). An impost, or duty (which are specific kinds of taxes directed at imports and exports) does not treat imported goods the same as goods already in the state. The likelihood of those imports being sent off to other states was high (cf. *Madison*, Debates, 192, 196), and the burden on the inland states was clear. The Import-Export Clause, then, was designed to end this tribute.

The way chosen to end this particular form of discrimination against inland states was to end the capability of the coastal state to discriminate against imports and exports. The Constitution gives this job to the Federal Government. It was the central government which was to regulate commerce among the states and with foreign nations (see *Brown v. Maryland, supra,* 25 U.S. at p. 446, 6 L.Ed. at p. 668). Surely, the central government has the right to prevent discrimination against imported goods and any impost or duty would cause that discrimination, unlike other taxes.

The particular type of discrimination against the states ended by Article I §10, Cl. 2 was discrimination against imports (cf. Crossky, *Politics and the Constitution in the History of the United States* [1953], Chicago University Press, pp. 295-323; Madison, Debates, supra,at pp. 192, 196; Powell, supra; Early & Weitzman, supra). Prohibiting imposts and duties, and only imposts and duties, accomplished this.

Second: Related to discrimination against imports is the so-called "importer's right to sell." Two of the Petitioner's claims are based, at least in part, on this concept. 1.) Because the importer paid customs' duties, he has a right to sell the goods without being taxed; 2.) Paying customs' duties and local taxes puts the importer at a disadvantage.

The first claim, of course, is not based on any case. Paying customs duties is not for the purpose of equalizing the effect of local taxation (Preamble to the Tariff Act of 1930,

19 USC § 1202 et seq). A review of this section makes it clear that *the variation of duties paid is not related to local taxation but to the nature of the goods and the country from which the goods come.*

Justice Marshall did not state in *Brown v. Maryland* that customs duties were somehow payment in lieu of local taxes. If this were the case, there would be *no* local taxation of imported goods at any point. There *is* local taxation, however, when original packages are broken and when the goods are treated by their owners for their use (including sale) like any other goods in the country (see discussion of the historical context of *Brown v. Maryland, infra).*

The second claim is, in reality, based upon the first. It makes the assumption that tariffs are meant to protect the importer from local taxation, when, in fact, they are meant, among other things, to protect domestic industry. The importer pays duties in order to be on an equal footing in this country with domestic producers, not better.

What, then, is the right to sell? It does not last, even by the terms of its broadest interpreters beyond the point where shipping containers are opened. Its basis, of course, is in Congress' right to regulate foreign commerce. At a time when the principal source of Federal revenue was customs duties, it is feared that discriminatory taxes might discourage imports. But it is clear that certain sorts of tonnage duties were allowable (*Clyde Mallory Lines v. Alabama, supra.).* At the

same time income taxes on the sale of imported goods were allowed *(Burke v. Wells, supra)* These taxes as well as the license taxes allowed by *Brown v. Maryland* would all inhibit imports. Yet they were all allowed.

At the same time a tax specifically allowed under *Brown v. Maryland, supra,* was struck down by this Court *(Cook v. Pennsylvania* [1878] 97 U.S. 566, 24 L.Ed. 1015). The only difference between those two taxes was their discriminatory nature. Once this is grasped, it is an elementary thing to see that the Federal revenues would have been hampered far more by discriminatory taxation than by non-discriminatory varieties. The intention of the Framers as interpreted by later courts is also apparent. That intention was not to prevent all taxation of imported goods. The only intent was to prevent that taxation which would discriminate against imports. Any other interpretation of this policy is contrary to the actual words of the Constitution, the intent of the Framers, later courts, and, as we shall see, *Brown v. Maryland.*

Cases which simply assert the right of the importer not to be taxed up to a certain point do not relate that right to the policies behind the Import-Export Clause and are unhelpful.

Perhaps it is the Commerce Clause which is founded on a policy which prohibits taxing goods which have come to rest in a state after importation and which are available to the owner for his own uses, including distribution. *Woodruff v.*

Parham, supra, makes it abundantly clear that a state will not interfere with this regulation by imposing property taxes on interstate imports once they are at rest and are at the disposal of the owner, even to ship the goods out of the stateagain (cf. *Minnesota v. Blasius, supra).* It would appear that Congress' regulation of commerce, if seen as uniform, would not call for an absolute right to sell, but only a right to sell on the same footing as domestic producers. Such a uniform rule would allow taxation when the goods have come to rest, for purposes other than merely awaiting transportation (see discussion regarding the role of the warehouse in 1827, infra).

Possibly, however, the power to regulate foreign commerce is different. Possibly, Congress should have more discretion in the area of imports and exports than in the area of domestic commerce. This does not appear to be the case in the area of exports. In that area, the most restrictive test on the taxing authority involves goods produced in one state from which they have commenced their export journey toward another state's deep-water harbor for shipment abroad. *Carson Petroleum Co. v. Vial* (1928) 279 U.S. 95, 73 L.Ed. 626, 49 S.Ct. 292, exemplifies the approach used. It is one which involves the determination of whether commitment to the transportation abroad has been made. Some tests allow the taxing authorities more leeway (cf. *Farmer's Rice Cooperative v. County of Yolo* [1975] 14 Cal.3d 616, 122 Cal.Rptr. 65, 536 P.2d 465). All of the tests, however, revolve around the

degree of commitment to transit and correspond generally to the rules for interstate commerce.

What is there, then, about imports and property taxes which has caused such inequality? The policies of the Clause lead to the conclusion of taxability. There are several arguments often used to prohibit taxation: 1.) The Import-Export prohibition "attaches" to the import in its status as an import; 2.) the importer has a right to sell in unbroken packages; and 3.) the goods may only be taxed at their "ultimate" point of use. These arguments, however, are circular. 1.) The status as an import is cut off at some time. That time should be related to the policies of the Import-Export Clause. 2.) As we have seen the right of the importer is both inconsistent and cut off at some time. Those times should be related to the policies of the Import-Export Clause. 3.) The ultimate point of use is not a creation of the Framers or even *Brown v. Maryland,* but is a concept of later vintage. It is unrelated to the policies because it serves no consistent purpose. A tax at that point is just as hindering as a tax at the distribution point. In fact, *Youngstown Sheet & Tube Co. v. Bowers supra,* holds goods taxable even before they reach an inland consumer. There is no difference in the effect on the importation of the goods whether a tax is imposed before or after the manufacturing process. In addition the process of actually melting the goods down bears little relationship to the determination of taxability.

The question still is, what is there about imports and property taxes which has caused this inequality. Why are imports treated differently regardless of whether they are in transit? And why does an importer have more of a right to avoid one specific kind of tax than an exporter, an in-state producer, or an out-of-state distributor bringing his goods in-state for distribution to still other states?

POINT 3

THE HISTORICAL CONTEXT OF BROWN v. MARYLAND REVEALS THAT (1) THE GOODS IN THAT CASE WERE IN TRANSIT AND (2) JUSTICE MARSHALL APPROVED OF TAXING IMPORTS ON A NONDISCRIMINATORY BASIS.

Although Justice Marshall never meant to treat importers better than other businessmen, later views of his opinion in *Brown v. Maryland* lie at the center of local government's dilemma. The original package statement, unexpectedly, led courts to be constantly looking over their shoulders. When imports were not directly involved the original package idea was rejected (*Woodruff v. Parham, supra*). When imports were at issue the original package suddenly became the most important doctrine available (*Low v. Austin* [1871] 80 U.S. [13 Wall.] 29, 20 L.Ed. 517, and the overruled

California Supreme Court opinion, which attempts to use the policies involved, *Low v. Austin* [1871] 1 Calif. Unreported Cases 642). We have already determined that neither the Import-Export nor the Commerce Clause obliges one to discriminate against exporters and domestic businessmen. It is peculiar that *Brown v. Maryland, supra* should cause such differences in treatment and the heated discussion it engenders as well (cf. Crossky, *supra* ; Early & Weitzman, *supra* ; Prof. Henry M. Hart, Jr., *supra*. Justice Marshall's opinion has not been given rave reviews, and its effects in the field of imports have been seen as inconsistent (Prof. Thomas Reed Powell, *supra*.

These amici hold an alternative view of the opinion. An examination of the historical setting of *Brown v. Maryland (supra)* and a close reading of the opinion yield two conclusions. 1.) The goods in that case were not at rest, but still in transit in the modern usage of that concept. 2.) The examples used to show when taxability would occur were examples of when the goods would be taxed on a *nondiscriminatory* basis.

A review of the commercial setting at the time of *Brown v. Maryland* will make Justice Marshall's intentions regarding the Import-Export Clause clear.

The decision itself recognizes that changing factual circumstances may change the outcome of a case.

> "The power and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinctions between them. Yet the distinction exists, and must be marked as the *cases arise. Till they do arise, it might be premature to state any rule as being universal in its application.*" (Emphasis added.)

Justice Marshall went on to say,

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state. . . ."
> (25 U.S. at p. 441, 6 L.Ed. at p. 686.)

The Court invites a review of the evidence, and does not force one to mouth tests which may have changed their meaning.

Such a review reveals that the commerce of 1827 was a far cry from today's. Ordinarily, the merchant who was actually planning on retailing the goods from his store would act as importer, shipowner, and even buyer (*Murr, Export/Import Traffic Management and Forwarding,* pp. 3-7). The warehouse that he used was almost universally a dockside affair meant almost exclusively as a holding point after the goods were unloaded from the ship and awaiting further transportation (Ackerman, *Understanding Today's Distribution Center,* p. 2). Clearly, goods in such a warehouse and awaiting transportation in their shipping containers, are in transit (cf. *C.F. May v. New Orleans* [1900] 178 U.S. 496, 44 L.Ed. 1165, 20 S.Ct. 976). They are not taxable under any theory since the Commerce Clause rules for interstate commerce would apply to the imports as well.

It is difficult to realize what a transformation in commerce resulted from railroads between 1830 and 1860. Perhaps, it is a natural inclination to believe that not much could happen during such a time. But, clearly, the industrial revolution was in full sway. Those warehouses which were mere waiting places were suddenly found inland along railroad sidings not acting as holding places for goods in their shipping containers or stacked together, as they were in the ship, but a place of feverish activity, where goods were sorted and made ready for any destination an order might call for. By the time of *Low v. Austin* (1871), *supra,* the importer's warehouse was no longer a holding area but a distribution center. (Ackerman, supra, p. 2.)

But the Court in *Low v. Austin* saw only that there was a warehouse and that it belonged to the importer. Its function was entirely different, but the Court applied the same rule to it. Justice Marshall never intended his illustrations to be taken out of context to discriminate against domestic producers and coastal state residents.

History has changed the distribution center even more today. The sea van can avoid double handling. Although the evidence before the trial court was to the effect that truck trailers may be loaded on ships, as well as sea vans (or cargo vans, cargo containers, etc.), the fact is that they have created another revolution in the transportation industry (cf. Vandenberg, *Containerisation, A Modern Transport System),* and the declaration of Ronald A. Tippie contained in the Clerk's Transcript on appeal, California Court of Appeal. 2d District, 2d Civ. No. 46268, included herein as Appendix A). The ability to swiftly move goods inland without breaking the unit of transportation and without double or triple handling has allowed the goods to be moved in their shipping container beyond the boundaries of the port state, overnight if necessary. The Petitioner in this case, for instance, was not forced to have its distribution center at Savannah, or any other port. It has its distribution point for the six southeastern states in a small inland town. Its distribution point for many of the plains states is Johnson County, Kansas. (See *Michelin Tire Corp. v. Board of County Commissioners, etc., et al.* [Dist. Court of Johnson County [1975] Nos. 54594, 56432,

58006, 59905, wherein goods under these same conditions, both packaged and unpackaged, were held taxable, referred to in the brief of Amicus Curiae, State of Kansas.)

Although the importer/distributor may wish to place his distribution center in some large city (almost all of our largest cities are near coastlines), it may choose to put them as far inland as his economic necessities dictate (Vandenberg, supra, p. 23).

There is only one usual stopping place before the goods are unloaded at the distribution center and that is at the container yard where the cargo containers are unloaded and held until a truck, with a specially designed chassis, can come for them. If they are not sold or used by the importer/distributor for his benefit, all will agree that they are not taxable there. The container yard (CY or CFS) is the modern counterpart of the "warehouse of the importer" of 1827 (see Appendix A). Its purposes are precisely the same. If in 1827, the goods were taken out of their shipping container, it would indicate that the goods were available for the owner's use, in state or out. The same is true if the owner took them out and began to sell them either as a peddler or auctioneer. There is little doubt that some of those goods, taken out of their shipping boxes might be sold to someone from another state, either at the merchant's store or in the other state by the peddler. Still, they would be taxable in the port state, be-

cause they had terminated their import journey and were available for the use of the importer, who was, incidentally, no longer acting on the goods as an importer but as a merchant.

In actual fact, *Brown v. Maryland, supra,* did lay down the same rule as *Minnesota v. Blasius, supra.* It may be argued that Justice Taney did not agree with this position, that he felt that the imported goods should be protected to the point of their ultimate consumption. It is true that he made such comments, but he did so believing that *Brown v. Maryland, supra,* did not apply to ad valorem property taxes. (See *Licenses Cases* [1847] 46 U.S. [5 How.] 504, 576, 12 L.Ed. 256, 288, and argument, infra.)

Justice Black also implied this in his dissent in *Hooven and Allison v. Evatt* (1946) 324 U.S. 652, 688, 89 L.Ed. 1252, 1276, 65 S.Ct. 870.

The problem with this ultimate consumption rationale is that it does not serve any policy of the Import-Export Clause since consumers may still have to pay the importer/manufacturer for the tax in *Youngstown.* The rationale does not square with what Justice Marshall meant to hold as shown by the historical context of *Brown v. Maryland, supra.*

It is apparent, then, that the state's power to tax goods which may be destined elsewhere is equal, whether the goods be exports, imports, or interstate exports and imports. It should also be noted that some cases involve importation

of goods solely to the state in which they are taxed (cf. Stipulation of Facts, *Hart v. County of Los Angeles,* Los Angeles Superior Court No. C 83087 attached as Appendix B, p. 28). Here, even the "ultimate point of consumption rationale" serves as no bar to a tax; and yet, Courts have clung to the original package concept, despite this fact.

Perhaps, even in the face of all of this, it may be thought that Congress should have the right to give an importer preferential treatment, not accorded to United States citizens, or that one group of citizens should be allowed certain privileges not accorded to others. Such treatment would run contrary to both the Tenth and Fifth Amendment (see argument infra). But there is additional evidence that even when the United States has been in an exceptionally strong negotiating position, they have not asked other countries' citizens to surrender their rights, compared with United States citizens. (See *Snow, Treaties and Topics in American Diplomacy* (1894) pp. 50, 117, 127, 129, 178, 183, and the General Agreement on Tariffs and Trade, the Preamble, and Part II, Article III, Paragraph 2. Research has revealed no treaties whereby Congress has given any country preferential trading rights vis-a-vis United States citizens.

The importer, by paying his customs' duties, has a right to be as free from other taxes as any domestic manufacturer/distributor, not freer. He has the right to sell his goods, once Federal imposts are paid, on an equal footing with his domestic counterpart, not higher. And he has the

right to as much exemption from taxes while the goods are on their way as an American trader, not more.

The inland consumer has the right not to pay a tribute to another state, whether that tribute be imposed on domestically produced goods on their way to him or imported goods. But he is not free from the cost of getting goods to him, and there is no rationale which places the "inland" buyer of imported goods in any better position in this regard than an "inland" buyer of domestically produced goods shipped intrastate. All of these inconsistencies will be resolved when the nature of commerce in 1827 is recognized. *Brown v. Maryland*, *supra*, may stand for the proposition that the present interstate rules are the same as those which should have been the rules for foreign imports.

There is another equally cogent reason to come to this same conclusion. Justice Marshall's opinion stresses the importance of "mixing" the goods with domestic goods. Even the examples of the peddler and the auctioneer are used with this mixture in mind. From this thought has grown a "rule" for determining taxability. *Youngstown Sheet & Tube Co. v. Bowers (supra)* 358 U.S. at p. 549, 3 L.Ed.2d at p. 500-1, 79 S.Ct. at p. 392 shows this same concern. Yet, rationally, mingling the imported goods would not seem to make them any less imported, nor even any less at their "ultimate" destination.

The effort to understand *Brown v. Maryland* is made easier when it is remembered that a primary form of state

taxation was the license or occupation tax. Research has revealed no ad valorem property assessments of goods held for sale (Ely, *Taxation in American States and Cities*, p. 41; Digest for Pennsylvania Laws 1700-1830; Maine Revised States 1841, Maryland Laws 1692-1839; Laws of Vermont 1824; Massachusetts Laws 1823; Laws of Massachusetts 1822-1835; Revised Statutes of New York 1829; Rhode Island Public Laws 1822-1842; Statutes at Large [Virginia] 1831-1832; North Carolina Laws 1829-1832; North Carolina Laws 1827-1818; New Hampshire Laws 1822-1827; Georgia Laws 1827-1828; Delaware Laws 1827-1829; Statutes of Connecticut 1821.) The single exception appears to be South Carolina (South Carolina Statutes, Vol. 6, 1814-1838, p. 96).

When the goods are in the hands of an importer who is also dealing with domestic goods a tax upon his occupation (peddler or auctioneer) will not reach imported goods per se, but upon domestic and imported goods on a nondiscriminatory basis. With this understanding the examples become clear. Justice Marshall saw that a license tax could be imposed discriminatorily, and he blocked that effort. But he never meant to rule on the applicability of our present system of property taxes, because he never saw it. The breaking open of the shipping container has reinforced his idea but not because an "inland" consumer would never be effected. In fact, it may have been that that "inland" consumer would ultimately pay a tax imposed after the goods were taken from such containers.

Justice Marshall was confident, however, that the goods in such containers were not mixed up with other goods thereby rendering any occupation tax discriminatory. He said as much (25 U.S. [Wheat] at p. 441-2, 6 L.Ed. at p. 686). But for the next 150 years no one listened.

The effect of this interpretation is to prohibit *any* discriminatory tax, such as that involved in *Department of Revenue v. James B. Beam Distilling Company* (1964) 377 U.S. 341, 12 L.Ed.2d 361, 84 S.Ct. 1247. The Commerce Clause would then be sufficient to prohibit any tax, whether discriminatory or not, while goods were in transit, or had interrupted their journey only to obtain further transportation.

The alternative is the holding that the Import-Export Clause prohibits taxation of goods while in transit. This, surely, is closer to the original intent of both the Framers and Justice Marshall than rules laid down blindly with little recognition of the policies of the Clauses.

POINT 4

THE IMPORT-EXPORT CLAUSE WAS NEVER MEANT TO APPLY TO AD VALOREM PROPERTY TAXES

There is another reason why the Import-Export Clause should not bar nondiscriminatory ad valorem property

taxes: Neither "impost" nor "duty" were meant to include property taxes. The most searching historical study of this point is to be found in Crossky, *Politics and The Constitution in The History of the United States, supra,* pp. 295-323. The sources used in that author's treatise are convincing proof that the Framers of the Constitution had no intention of depriving the states of the right to assess property (see also Early & Weitzman [*supra*], Prof. Hart [*supra*], and Prof. Powell [*supra*]).

The Constitution of the United States gives to the Federal Government power to lay "taxes, duties, imposts and excises"(Article I, § 8) but prohibits the states from imposing imposts and duties. All historical authority points to the fact that property assessments are neither imposts nor duties (E. G. *Crossky, supra),* and were not meant to include general taxes of a nondiscriminatory nature.

It is important to realize that *Brown v. Maryland* (1827), *supra,* first distinguishes between "imposts" and "excises," but holds the excise in question to be an impost in substance because it is directed specifically at imported goods, i.e., it discriminates against them. This emphasis upon discriminatory taxes grew out of the Constitution and the Constitutional debates. Duties were specifically defined as stamp taxes while imposts are taxes specifically directed at imported goods (cf. Martin, Debates, pp. 51, et seq).

In giving up the right to lay imposts and duties, the states were not under the impression that they would be giving up the right to assess property within its territory. This is evidenced by the comments of Governor Ellsworth at 2 Madison, Debates 192 and 195. These words are also quoted in *Woodruff v. Parham, supra:*

> At page 196, he states:
> "It is a strong argument in favor of an impost, that the collection of it will interfere less with the internal policy of the state than any other species of taxation. It does not fill the country with revenue officers, but is confined to the sea coast, and is chiefly a water operation. . . "

The *Woodruff* Court goes on to say, in connection with its reasoning, that imposts and duties do not apply to interstate commerce:

> "It is not too much to say that, so far as our research has extended, neither the word 'export,' 'import' or 'impost' is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special

> form of words to show that *foreign* commerce is not meant." (Emphasis added.)

In fact, *Woodruff v. Parham* argues strongly that the Import-Export Clause in general, and, therefore, imposts and duties, was never meant to apply to domestically produced goods. The inference is clear. Imposts, a tax directed specifically at imports, and duties, a type of stamp tax, were never to be used by the states. It is equally clear that a nondiscriminatory ad valorem assessment is neither an impost nor a duty as those words were used when the Constitution was written, or when Justice Marshall wrote his opinion. It should be noted that Professor Crossky's book is not the only research on this point. These same conclusions are also made both by Judge Early (Early & Weitzman, *supra*, and by Prof. Powell (Powell, *supra*).

It may be asserted that *Richfield Oil Company v. State Board of Equalization* (1946) 329 U.S. 69, 91 L.Ed. 80, 67 S.Ct. 156, is dispositive of this definitional question. There, the Court said:

> "It seems clear that we cannot write any . . . qualifications [regarding the discriminatory nature of the tax] into the Import-Export Clause. It prohibits every state from laying 'any' tax on imports or exports without the consent of Congress.

> Only one exception is created – 'except what may be absolutely necessary for executing its inspection laws.' The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax." (329 U.S. at p. 76.)

The decision acknowledges that the Import-Export Clause was defended at the Convention and in other debates on the basis that "levies" would be prohibited (329 U.S. at p. 76

But, in noting 2 Farrand, *The Records of the Federal Convention* (1911) pp. 307, 359-362, 442; 3 Elliott's *Debates* 2d Ed. p. 483; and *The Federalist No. 42,* the *Richfield* Court did not point out that Article I § 10, Clause 2 does not refer to "taxes," but to imposts and duties. In fact when Article I § 9, Clause 5 refers to taxes, it supports the concept that there is a difference between the ambit of the two sections. Of course, *Richfield Oil Corp. v. State Board of Equalization* was still decided on the basis of when transport began, and no consideration of the shipping containers was even required.

The Court referred not to imposts or duties, however. Actually, it leapt to the conclusion that impost means any tax – a conclusion often reached on the basis of today's rather imprecise usage of the word. Professor Crossky's study and the other material cited herein make it abundantly clear that they are not the same.

These amici curiae believe that such conclusions are based upon the language in *Brown v. Maryland, supra,* to the following effect:

> ". . . but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a *tax* upon it is too plainly a duty on imports to escape the prohibition in the Constitution." (25 U.S. at p. 442, 6 L.Ed. at p. 686.)

What is clear from this quote, in the context of the decision, is that Justice Marshall, although correctly determining that the tax in question was worded as an excise, also determined that it was directed at imports. The statement, on its face, appears to conclude that *any* tax laid upon goods before they have been taken out of transit is contrary to the Import-Export Clause.

However, Justice Marshall did not have any tax in

mind. We have seen that there were no ad valorem assessments on inventory or any personal property for sale in existence in 1827. (See Ely, supra; and State Laws of 1827, supra.)

The only tax with nondiscriminatory effects which Justice Marshall considered was that placed on all auctioneers and peddlers, some of whom might sell the imported goods in their original package. This tax he thought to be valid.

It has been the interpretation of this Court that any state tax laid upon goods while in transit is contrary to the Commerce Clause. These amici curiae believe that imports from foreign countries are also protected from any tax while in transit and further protected from any impost or duty by any state forever. It is clear that this is what the Framers of the Constitution had in mind.

The fact the Constitutional prohibition on imposts and duties is so complete is further evidence of the narrow usage of the terms. When Justice Marshall expanded the prohibition to excises he was only concerned with the discriminatory ones. He held, for instance, that a tax on auctioneers was clearly valid. In *Cook v. Pennsylvania (supra)*, this Court determined such a tax to be invalid. The Court, sensing the evidentiary nature of Justice Marshall's example did not hold the auctioneers' tax valid because *Brown v. Maryland* said it should be. The Court found the tax to be *discriminatory* against imported goods. That discrimination was the key

difference between Justice Marshall's example and the facts in that case. The Court was able to look to the intent of the Import-Export Clause and see a change in the relevant evidence between the two cases.

POINT 4a

THE IMPACT OF LATER EXTENSIONS OF THE IMPORT-EXPORT CLAUSE

It can readily be seen from the discussions of the intention of the Framers of the Constitution that the narrow definition of imposts and duties was meant and that the states were absolutely prohibited from using tehse devices on imports and exports, not just until they were mingled with the property of the state, but forever. In short, taxation which discriminated against imports or exports was a function of the Federal Government. The ambit of the Import-Export Clause, as originally conceived, was, indeed, different. The Import-Export Clause would never have prohibited ad valorem property assessments. (See Crossky, *supra*). But the Commerce excludes any taxes, including ad valorem property assessments, if they tend to interfere with Congress' authority to regulate commerce.

We have seen why Justice Marshall laid such

emphasis on the mingling. We have also seen that the goods in *Brown v. Maryland, supra,* were in transit and were protected by the Commerce Clause. In either case such a tax on goods in transit would indeed discriminate against inland states. The resident of an inland state who dealt in the coastal state only to move his goods out of that state to his store would be at a disadvantage from such a tax. But at the opposite end of the spectrum are Justice Taney's comments in the *Licenses Cases* (1847). 46 U.S. (5 How.) 507, 12 L.Ed. 256:

> "Undoubtedly, a state may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade or of imported goods which he proposes to sell, or of any other property of which he is the owner. . . ."
> (46 U.S. at p. 576, 12 L.Ed. 288.)

Justice Taney emphasized the impropriety of taxing goods while in transit, a Commerce Clause prohibition. Goods destined only to inland merchants which were in dockside warehouses were immune. It was also clear that he

was considering license and occupation taxes in their discriminatory sense. At this point the Commerce and Import-Export Clauses still had very different functions and were not coterminous.

The case which ignored Justice Taney's remarks and led to the idea that the Import-Export Clause prohibits any tax on imports or exports when not in transit was not *Low v. Austin, supra,* as so many believe, but *Woodruff v. Parham* (1869) 75 U.S. (8 Wall.) 123, 19 L.Ed. 382. That case ruled that a nondiscriminatory tax on property was valid, even though the property consisted of imports from other states.

Now, if nothing else about the Import-Export Clause is clear, it is clear that imposts on interstate imports and exports were just as much prohibited as foreign imports and exports. (See Crossky, *supra).* A tariff on interstate imports could be just as discriminating as one on foreign imports; and when it is remembered that the roads in early America were poor at best, it is seen that the position of the port cities vis-a-vis inland towns was just as critical for interstate commerce as for foreign.

The Court in *Woodruff v. Parham* would have prevented much confusion if it had simply recognized that all of the excises of the time were scheduled profession by profession and, except where imports were at the point where they

were treated side by side with domestic goods (e.g., peddler and auctioneer), any of the usual excises by profession would have been discriminatory. The Court also forgot that its view of the world had been drastically altered and that the railroad had changed commerce and the use of warehouses considerably. Such forgetfulness is natural.

It is particularly natural when Justice Marshall laid down a guideline with the words ". . . is too plainly a duty . . . " Such strong language was, and still is, a deterrent to thinking about the reasons for things. Instead, the Court took the much easier ". . . we suppose the principles laid down in this case, to apply equally to importations from a sister state." Of course, stare decisis, particularly stare Marshall decisis, was of even more vital importance than it is today. The *Woodruff* Court took the easy way out, but left a hard problem behind them.

That problem came before the Court in *Low v. Austin, supra.* The Court was unable to answer the California Supreme Court's argument to the effect that a nondiscriminatory tax did not by its very nature discriminate against imports and was, therefore, not in the ambit of the Import-Export Clause or *Brown v. Maryland.* The United States Supreme Court was also unable to deal with the logic that the original package "doctrine" as applied to imports did nothing to prevent higher prices inland, and that higher prices inland were not necessarily bad.

Instead, they focused on the "right to sell" argument. The Court stated simply that the importer had the right to sell his goods in their unbroken containers. As we have seen, this contention has precious little to do with the purposes of the Import-Export Clause. If it has something to do with the Commerce Clause, it is only that it allows the importer to sell on an equal footing with United States citizens, no more. But the *Low* Court had to go beyond this in order to sustain Justice Marshall's reasoning. A reading of the California Supreme Court opinion will convince one that the Court was unsure of Justice Marshall's reasoning. They were sure he meant to say that nondiscriminatory taxation was not barred by the Import-Export Clause. But they thought that the mingling argument and the statement that "taxes" were barred were somehow inconsistent with each other. They are, of course, until one remembers that there were no nondiscriminatory taxes in existence until the goods were mingled to be treated by the peddler or auctioneer alike with domestic goods.

So it is logical to assume that the *Low* Court, concerned with the awesome shadow of Justice Marshall and fenced in by the logic of the *Woodruff* Court, should stand its ground and reject the logic of the Court below. The Low Court ignored the fact that the goods were consigned rather than sold to the importer/distributor and ignored the harm to domestic producers.

What follows is, of course, logical. Courts by the score have failed to see *Brown v. Maryland* as laying down evidentiary guidelines, as dealing with the facts as they were in 1827, and have applied the original package concept, not like the evidence it was originally supposed to have been, but as dogma.

This Court has often referred to the Import-Export Clause as prohibiting a tax on "things" whereas the Commerce Clause prohibits taxes which interfere with Congress' regulation of commerce. Much is made of this distinction (cf. *Hooven and Allison v. Evatt, supra.* This is, no doubt, the result of the *Brown v. Maryland* concept of imports being such only until "mingled" with the property of the state. There is certainly nothing in the Import-Export Clause to indicate that the status as an import ceases at some time. Whatever its source, it does not follow that making such a distinction must mean that taxability under the Commerce Clause must be different from taxability under the Import-Export Clause.

Originally, of course, they were different. But subsequent enlargement of the ambit of the Import-Export Clause has caused it to take on some of the functions of the Commerce Clause. At the same time, the prohibition of the Import-Export Clause has been called into play with less and less attention paid to its reasons for being. The one principal excep-

tion to this is *Youngstown Sheet and Tube Company v. Bowers, supra.*

Hooven and Allison Company v. Evatt, supra, on the other hand, gives attention to the idea of the original package, while discussing whether the hemp was still an import. It was brought out that the Import-Export Clause was a prohibition of a tax on a "thing," i.e., imports, and, therefore, the discussion must center on when goods cease being imports. But ceasing to hold the status of an import is not a function of packages directly. It is a function of the policies behind the Import-Export Clause in particular and the Constitution in general. *Brown v. Maryland* asks us to go farther than the ordinary meaning of the word "package." It asks us to relate our discussion to the policies of the Constitution. Justice Marshall not only drafted his examples in the light of 1827's commercial and taxing procedures, but he also drafted them in light of the Constitution.

POINT 5

THE EFFECT OF APPLYING THE ABOVE ANALYSIS TO THIS CASE WILL BE TO MAKE THE ORIGINAL PACKAGE TEST MORE MEANINGFUL

All of the above may lead some to respond that these amici curiae wish to end the original package "doctrine."

As a formula, recited without actual meaning, these amici curiae would be pleased to see the end of such irrelevant dogma. It should be said, however, that goods still being in the form ready for further shipment, without being exposed to sale or otherwise at the disposal of the owner, may be sufficient to hold that they are still in transit, and, therefore, protected by the Commerce Clause. These amici do not feel that nondiscriminatory taxes are barred by the Import-Export Clause But even if they are, a full reading of *Brown v. Maryland* and its historical context should be sufficient to convince anyone that the extent of that protection goes only as far as the point where transit ends, and the goods are at the disposal of their owner. There is absolutely no reason supporting the Import-Export Clause, which carries any prohibition of a nondiscriminatory tax any further.

One may believe that the original package evidence should be used as a rule, and should apply equally to both discriminatory and nondiscriminatory taxes for the sake of uniformity. It should be clear by now that the Framers of the Constitution did not intend for nondiscriminatory taxes to be effected. Once expansion goes beyond the intent of the Framers of the Constitution any proposed "rules" should be closely scrutinized to determine whether they comport with the policies of the Constitutional provision being interpreted. If there is no reason other than a feeling that "things should be neat" to prevent state action, the proposal should be rejected and a more flexible approach should be taken.

The original package concept may have a place in determining whether transit has ended for the purpose of the Import-Export Clause or the Commerce Clause. That place was never meant to be any more than an evidentiary one, as set forth above. To elevate a piece of evidence to the status of an unvarying rule does a disservice not only to the states which have been left with the remaining powers not specifically enumerated in the Constitution, but also to Justice Marshall.

He was wise enough to know that circumstances change.

POINT 6

OTHER METHODS OF CONSTITUTIONAL INTERPRETATION LEAD TO THE CONCLUSION THAT DISCRIMINATING AGAINST UNITED STATES RESIDENTS, DOMESTIC PRODUCERS AND INTERSTATE IMPORTERS IS INCONSISTENT WITH THE REST OF THE DOCUMENT

POINT 6a

CONSTRUCTION OF ARTICLE I, § 10 CLAUSE 2, SO AS TO PROHIBIT A NONDISCRIMINATORY AD VALOR-EM TAX WOULD VIOLATE THE TENETS OF EQUAL PROTECTION AND THUS CREATE AN INTERNAL CONSTITUTIONAL INCONSISTENCY

It is axiomatic that the Constitution must not be construed in such a manner as to "defeat rather than effectuate the constitutional purpose." (*United States v. Classic*, [1941] 313 U.S. 299, 85 L.Ed. 1368, 61 S.Ct. 1031). Thus, potentially conflicting constitutional provisions must be interpreted in a consistent manner in order to further said constitutional purpose.

If Congress, rather than the Supreme Court were to partially prohibit a non-discriminatory ad valorem tax levied on all goods within a state, said prohibition would violate the Fifth Amendment's implied guarantees of equal protection. (See *Frontiero v. Richardson* (1973) 411 U.S. 677, 36 L.Ed. 2d 583; 93 S.Ct. 1764). The fact that such a breach of equal protection would be the result of adoption of Petitioner's interpretation of Article I, § 10, Clause 2, rather than from a statute enacted by Congress, makes the wrong no less burdensome.

As indicated previously in this brief, the prohibition on a nondiscriminatory ad valorem tax would not only discriminate against domestically produced goods (by giving the imports a price advantage), but would also force the citizens of the coastal states to subsidize the cost of the imported goods by paying taxes in order to provide "free" police service for the importer. It is also true that citizens of "inland" states would also bear some of this cost, if they buy U.S. goods which were distributed from or through a "coastal" state.

In order to show a violation of equal protection, we must analyze the purpose of Article I, § 10, Clause 2 (analogous to a legitimate state interest), compare it with the interpretation advocated by the Petitioner (analogous to the means used to attain the legitimate end), and then determine whether or not the interpretation is rationally related to the purpose.

The prohibition against states levying an impost or duty on imported goods has, as documented elsewhere in this amicus brief, a twofold purpose: Prevention of discrimination against inland states; and preservation of the exclusive authority to raise revenue through imposts by the Federal Government.

The interpretation by the Petitioner of Article I, § 10, Clause 2 (i.e., the means of attaining this dual purpose), prevents any form of taxation upon imported goods before sale while such goods are in the "original form" or their "original packages."

Despite the fact that such an interpretation prevents a nondiscriminatory ad valorem tax only on imported goods within a state, thereby discriminating against domestic goods and citizens of coastal states (as shown supra), said interpretation is not violative of equal protection if it is rationally related to the legitimate purpose of Article I, § 10, Clause 2, of the Constitution.

Rational relationship, as evidenced by the plethora of Supreme Court decisions in this area, has no single meaning. However, rational relationship, in its most traditional sense (i.e., "mere" rational relation) calls for a minimal nexus between the Petitioner's interpretation and the legitimate purpose (*Kotch v. Board of River Port Pilot Comm'rs* [1947] 330 U.S. 652, 91 L.Ed. 211, 67 S.Ct. 504.) While, undoubtedly there is *some* relation between the means and the purpose in this case, it can hardly be called rational, even in the traditional sense. This Court, in *Phila & Reading R. Co. v. Pennsylvania* (1873) 82 U.S. (15 Wall.) 284, 21 L.Ed. 164 recognized the absence of a rational relationship when it stated:

> "And yet if the states may tax at pleasure imported goods, so soon as the importer has broken the original packages and made the first sale, it is obvious the tax will obstruct importation quite as much as would an equal impost upon the unbroken packages before they have gone into the markets."

Thus, as early as 1873, the Court recognized the disparity between the purpose of "Import-Export Clause" and the interpretation used to attain that purpose.

This disparity becomes even more obvious when contemporary standards of the rational-relation test are used. Assuming, *arguendo,* that Petitioner has satisfied the threshold requirement of showing a traditional rational relation, recent decisions of this Court indicate that the means utilized (i.e., Petitioner's interpretation of Article I, § 10, Clause 2) must be necessary to bring about the legitimate purpose. (*Bullock v. Carter* (1972) 405 U.S. 134, 31 L.Ed. 92, 92 S.Ct. 849.) This showing of necessity may be achieved only if Petitioner can show that there are no less burdensome alternatives. (*Lubin v. Panish* (1974) 416 U.S. 709, 39 L.Ed.2d 702, 94 S.Ct. 1315.) That is, if the dual purpose of Article I, § 10, Clause 2, can be realized without causing discrimination against domestic goods or against citizens of coastal states then the requisite of necessity, necessary to sustain Petitioner's interpretation, cannot be met.

In fact, by allowing a nondiscriminatory ad valorem tax when the goods are at rest and available to the owner for sale or distribution, the Court would alleviate the discriminatory burdens cited above and, as pointed out by this Court in the case of *Phila & Reading R. Co., supra,* achieve the same purposes intended by the Framers of the Constitution as could be attained by Petitioner's construction.

Through employment of this analysis, it is obvious that a Federal statute, adopting Petitioner's interpretation of the "Import-Export Clause," would violate equal protection. If the Court were to adopt the Petitioner's interpretation, an internal inconsistency between Article I, § 10, Clause 2, and the Fifth Amendment, would develop. Such inconsistency would, in fact, "defeat rather than effectuate the constitutional purpose."

POINT 6b

THE POWER OF PROPERTY TAXATION, RESERVED TO THE STATES BY THE TENTH AMENDMENT, WHEN VIEWED IN HISTORICAL PERSPECTIVE, ALLOWS NONDISCRIMINATORY TAXATION ON IMPORTED GOODS

The basic premise of the "Reserve Clause" has been expounded by this Court: "The Tenth Amendment 'states but a truism that all is retained [by the states] which has not been surrendered.'" (*U.S. v. Darby* [1940] 312 U.S. 100, 124, 85 L.Ed. 609, 622, 61 S.Ct. 451, 462; *Case v. Bowles* [1945] 327 U.S. 92, 102, 90 L.Ed. 552, 560, 66 S.Ct. 438, 443.) In order to determine exactly what has been retained by the states we must, of necessity, view the constitutional limitations in light of the meaning attributed to the words by

the Framers of the document. (*W., P. and Cin. Trans. Co. v. Wheeling* [1878], 99 U.S. 273, 25 L.Ed. 412, wherein the Court stated that in order to determine the meaning of "taxation on tonnage," the Court must look to the intent of the Federalists.)

In depth analysis of the meaning of the Import-Export Clause indicates that the Framers did not intend a prohibition on "imposts" and "duties" to act as a prohibition against the levying of a nondiscriminatory ad valorem tax. (W. Crossky, *supra.*) This insight, contributed by Professor Crossky, coupled with the historical research of these amici curiae (set forth *supra*) clearly indicate that a nondiscriminatory ad valorem tax was not meant to be prohibited by Article I, § 10, Clause 2, of the Constitution. It follows logically, therefore, that the power to levy said nondiscriminatory tax is reserved to the states.

The dissenting opinion in *Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co.* (1968) 394 U.S. 369, 22 L.Ed.2d 344, 89 S.Ct. 1109, pointed out that, though "[s]tates' rights are often used as a cloak to cover unconstitutional encroachments," obviously not all uses of said concept inure to the detriment of the Constitution. Moreover, the opinion went on to state that "the Court, mindful of the force of the Tenth Amendment and the place of the States in our constitutional system, *has resolved close cases in favor . . . of the states . . . .* " (Emphasis added.) Thus, even if the in-

tent of the Framers to reserve the power of nondiscriminatory taxation were not made obvious by Professor Crossky, "close cases" should be decided in favor of the state.

Even if the research of Professor Crossky and the intent of the Framers is rejected, an interpretation of *Brown v. Maryland (supra)* to the effect that nondiscriminatory taxes are barred only until the goods come to rest and are at the disposal of the owner, achieves the ends of the Constitutional provision. The interpretation offered by the Petitioner would take away the power reserved to the states without reason. The Import-Export Clause's objectives will be achieved by ending the prohibition of *nondiscriminatory taxes* at that time. Discriminatory taxes were obviously meant to be prohibited forever.

POINT 6c

ARTICLE I, § 10, CLAUSE 2, SHOULD BE INTERPRETED SO AS TO BE CONSISTENT WITH ARTICLE I, § 9, CLAUSE 5

Both portions of the Constitution effect exports. Article I, § 9, Clause 2 states: "No *tax* or duty shall be laid on Articles exported from any State." This Court in *Peck v. Lowe* (1917) 247 U.S. 165, 62 L.Ed. 1049, 38 S.Ct. 432, allowed a Federal income tax on an exporter, which income was derived, in part, from sales in foreign commerce. Part of

the Court's rationale was based on the fact that the tax was nondiscriminatory and would effect exports and other goods equally.

In this case, there are domestically produced goods stored side by side with imported goods. A property tax would, like the income tax in *Peck v. Lowe, supra*, effect both the imported goods and the domestically produced goods equally. Holding that Georgia's nondiscriminatory ad valorem property tax is not valid would be inconsistent with Article I, §9, Clause 5. The Court would be ruling that Congress was somehow not prohibited as much as the states. In this regard, it should be noted that the Congress is prohibited from any tax, while the states are prohibited from imposts and duties only. Why, in the face of all this, Congress would have more power is not clear.

It may be argued that exports should be treated differently than imports. The difficulty with this rationale is that there is every reason, economically, to favor exports over imports. That is, no doubt, why Congress was not precluded, in Article I, §9, Clause 5 from laying taxes on imports. The Constitution itself indicates that exports are to be placed on a better footing than imports. Yet imports, by Court decision, have been given special privileges beyond anything any treaty gave them, beyond anything the Framers thought of, and beyond any reason supporting any part of the Constitution.

POINT 6d

ARTICLE I, § 10, CLAUSE 2, SHOULD BE INTERPRETED CONSISTENTLY WITH ARTICLE I, § 10, CLAUSE 3

This Court in *Clyde Mallory Lines v. Alabama* (1935) 296 U.S. 261, 80 L.Ed. 215, held what was in effect a tonnage duty imposed by Alabama to be valid. There can be no doubt that that case involved a charge based upon the tonnage of the vessel concerned. There is also no doubt that the basic policies of Article I, § 10, Clause 2 and Clause 3 are the same (*Clyde Mallory Lines v. Alabama, supra,* 296 U.S. at pp. 264-265, 80 L.Ed. at p. 217-8, 56 S.Ct. at pp. 195-196). The Court went beyond that, however, and validated the duty on the ground that its proceeds were used for the purpose of maintaining the harbor facilities and that the duty constituted a charge for the use of those facilities. It did not matter to the Court that the actual money given by the carrier may well not have been used to support the specific part of the harbor that the vessel was using.

That decision did refer to the charges not impeding the free flow of commerce. Despite the obvious increase in the importer's cost, this tonnage duty was not held to be impeding commerce. The only possible rationale is that the duty was nondiscriminatory and bore *some* relationship to the cost of maintaining the local facility.

In like manner, a property tax serves to pay for the protection and maintenance of a locality. The importer/distributor gains the benefits of that protection, and his payment goes into the same general fund which provides the services of which it has the advantage. It may be argued that property taxes pay for many things. It is true. It is also true that the duty in *Clyde Mallory Lines v. Alabama, supra,* also, no doubt, paid for many things of which the carrier did not receive the benefit. There is little distinction between the two taxes. (cf. Cases cited in *Clyde Mallory Lines v. Alabama* for the proposition that charges levied by states to defray costs of regulations or of facilities afforded in aid of interstate or foreign commerce are permissible. Protection of these goods and maintenance of highways are such facilities. The harbor in *Clyde Mallory Lines v. Alabama* may be used by in-state people as well as out-of-state people, and that makes no difference in the validity of the duty.)

The only question remaining is whether the amount of the tax was consistent in general terms with the services rendered. Taking into consideration the protection of all of the importer's/distributor's goods, $10,000.00 per year is adequately related to the police and fire protection the goods received, and the road maintenance, which allowed the goods to get into Lawrenceville and out when they were sold.

POINT 7

THE APPLICATION OF YOUNGSTOWN SHEET AND TUBE CO. v. BOWERS, SUPRA, TO THIS CASE IS PROPER

We have noted above that *Youngstown Sheet & Tube Co. v. Bowers, supra,* directed its attention to at least one of the policies behind the Import-Export Clause. Of course, it explicitly declined to rule on imports for sale. But its rationale is quite important and relevant.

In *Youngstown,* the importer/manufacturer/wholesaler brought goods [ore] from abroad. The goods were unloaded at port facilities and then carried to the Appellant's yard where they were kept. Out of the stack of goods, the Appellant drew some materials to periodically fill its needs.

All of these facts are exactly those of this case.

There are two possible distinctions between this case and *Youngstown:* 1.) Some of the goods at Michelin's warehouse were in cardboard boxes; and 2.) *Youngstown* put the goods through a manufacturing process before selling them. We must assume that the eventual purpose of the manufacturing process in *Youngstown* and the distribution process in the case at bar is to make a profit by selling the product (see Hart, *supra*). One would be hard pressed to conceive of a sit-

uation where the importer/manufacturer/wholesaler in *Youngstown* would refuse to sell to out-of-state customers.

It is clear, then, that in both *Youngstown* and in the case at bar an inland consumer may receive the brunt of the property taxes assessed in the same way. They will also be obliged to ultimately pay the taxes on the domestic goods held by importers. No statements to the effect that the prohibition of the Import-Export Clause "attaches" to imports in their status as such can obliterate this important similarity between the two cases. *Youngstown* stands as a flat rejection of the idea that consumers in other states should not ultimately pay the tax burdens of states to which the goods are imported. Of course, this idea was effectively blocked by *Burke v. Wells, supra,* where an income tax on proceeds from imports was held valid (also see *Clyde Mallory Lines v. Alabama supra*). It is also true that the examples of *Brown v. Maryland* do not preclude some burdens being placed upon "inland" consumers. All of this is true, despite the fact that part of the Court's rationale in *Youngstown* was that the goods were being put to their "ultimate" use. Of course, their "ultimate" use, in the eyes of the Appellant, was their sale as part of the manufactured good. That sale was for the importer/manufacturer/wholesaler's profit.

One may believe that, because the manufacturing process actually "mingles" imported and domestic goods, there is some distinction between that case and this one. Before distinctions are made, however, one should determine

whether those distinctions serve the policies of the Import-Export Clause. We have already seen that there is no distinction which effects the price paid by the "inland" consumer. There is also no distinction which effects the so-called right of the importer to sell. Even if that right were absolute, it has been abrogated in *Youngstown*, for the importer/manufacturer/wholesaler is liable for this and any other nondiscriminatory tax. The last possible policy which might call for asserting the Import-Export Clause's prohibition is discrimination against imports. The actual wrong, which was meant to be corrected by the Import-Export Clause (discrimination against the "inland" states) was meant to be ended by the prohibition. Of course, that policy is never countered by any nondiscriminatory tax.

There is, then, no policy of the Import-Export Clause, no matter how much those policies are stretched, which supports making any distinction between any of the goods involved in this case and those involved in *Youngstown*.

The Petitioner's "ultimate" use of the imports is to sell them (Petitioner's Reply Brief, concerning the acceptance of their petition, p. 3).

POINT 8

THE EFFECT OF APPLYING YOUNGSTOWN TO THIS CASE WILL BE TO ACHIEVE THE PURPOSES OF ARTICLE I, § 10, CLAUSE 2 AND TO LESSEN THE DISCRIMINATION AGAINST DOMESTIC PRODUCERS AND UNITED STATES RESIDENTS

There is one possible objection to applying *Youngstown* to the facts at bar: It will make further inroads into the so-called original package "doctrine." Of course, a correct view of the principle of *Brown v. Maryland* is that the "original package" was itself not meant to be extrapolated into doctrine, but was part of the evidence which led Justice Marshall to conclude that import transit was concluded and the goods were available to the importer for his own purposes. The original package, construed correctly as the shipping container (*C. F. May v. New Orleans, supra*), may still be a part of the consideration of when transit has ended, as it was meant to be in the first place. But it should not be, and was never meant to be, anything more than part of the evidence. If the goods are no longer moving, are unloaded from their method of transport, and are available to the owner for his own purpose (even eventual sale to customers out of state), there is no bar by the Commerce Clause and no policy of the

Import-Export Clause which will be served by not holding them taxable.

Applying *Youngstown* will actually oblige the states to compute "current operational needs" and exclude those goods which are not embraced thereby from property taxes, even though there is no reason for such an added exclusion. Depending upon the state, these reductions could be substantial (cf. *City and County of Denver v. Denver Publishing Co.* [1963] 153 Colo. 539, 387 P.2d 48).

Despite the added burdens on at least some states, *Youngstown* comes the closest of many cases to achieving the ends of the Import-Export Clause.

It may be difficult not to believe that the clause must have some strength, or some use, today, and, therefore, to search for such a use. The fact is, however, that, with the exception of a few cases (cf. *Department of Revenue v. James B. Beam Distilling Company* [1964] 377 U.S. 341, 12 L.Ed.2d 362, 84 S.Ct. 1247), very few states have actually laid imposts on imported products. It actually would make no difference in *Department of Revenue v. James B. Beam, supra,* whether the tax was actually imposed before or after the breaking of the packages. The crucial point of that case was that it dealt with an impost, an obligation discriminating against imports. It would have been just as unconstitutional if it had been assessed at that time the bottles were sold to retail outlets. The Court in that case did refer to *Low v. Austin*. But the Court would

still have been required to strike down the tax even if imposed after the "original package" was opened. The Court would then have been faced with the decision it is faced with here: The decision to distinguish impost from property assessment and to treat them in accordance with their respective purposes.

Applying *Youngstown* to this case will not totally remove the presently existing discrimination against the "distributing states and communities," but it will go a long way towards it. There is surely no reason for not applying *Youngstown.* Unfairness towards these states and communities as well as "inland" buyers of U.S. goods, is substantial reason to apply it.

POINTS 1-8

CONCLUSION

The discussion above has dealt with the objects of the Import-Export Clause. It was clear that the Framers sought to end a particular type of discrimination against the non-port states, which were then in a seriously disadvantaged position vis-a-vis the port states. They ended that discrimination by not allowing the states to lay imposts or duties on imports or exports. It is clear that in order to carry out those purposes, Justice Marshall prohibited discriminatory taxes on imports until they were being treated like other property in the state, whether to be sold to inland customers, or used.

We have already pointed out the fact that serious discrimination against the residents and domestic and interstate distributors must be ended. The two most clear paths to this solution are 1.) a rule to the effect that nondiscriminatory taxation is prohibited by the Commerce Clause and not the Import-Export Clause, or 2.) a rule to the effect that nondiscriminatory taxation is prohibited by the Import-Export Clause only until transit has ended and the goods are available to the owner for his own purposes, whether distribution or other states, sale in the taxing state, or both.

We have also seen that methods of constitutional interpretation, the historical context of that document, of *Brown v. Maryland*, and of later cases, and the decisions themselves lead to the conclusion that there is no reason to prevent the application of such rules. In fact, the discrimination against United States residents and producers is a clear mandate for such rules.

The application of *Youngstown* to these facts is warranted by the same policy considerations. Many states will be obliged to restrict the amount of goods taxed pursuant to cases already decided in their jurisdiction on the basis of *Youngstown:* but, clearly, a current operational needs test satisfies the policies of the Constitution and prevents at least some of the discrimination presently imposed on the localities which are chosen by the importer/distributor as its base of regional operations.

It should further be noted that "inland" states are no longer in the same position as they were in 1827. Railroads were the first means by which importers could also become distributors. The advent of air freight and highways has increased this flexibility to such an extent that Lawrenceville, Georgia and Johnson County, Kansas may be chosen by importers as distribution centers. There were no such things in 1827 and even with the advent of the railroad, not so many in 1871. Today, however, they abound. They are not the warehouses of 1827, and no Court has considered the impact of this change on *Brown v. Maryland, supra.*

POINT 9

THE TESTS PROPOSED BY THE PETITIONER DO NOT SERVE THE PURPOSES OF THE CONSTITUTION

The discussion below attempts to respond to Petitioner's points raised in their briefs. Since the points raised therein are not premised on the reasons behind the Import-Export Clause, limited responses to those points must fall short of achieving what the Framers and Justice Marshall desired. Limited counterproposals by these amici curiae can never cure the discrimination against United States residents and producers, and, like the Petitioner's proposed rule, will involve much further litigation in order to explain them. Nevertheless, the responses must be made, becaue they, at, least, approach the constitutional policies.

POINT 9a

THE PROPOSED ORIGINAL FORM "DOCTRINE" IS NOT SUPPORTED BY LOGIC OR BY BROWN v. MARYLAND

The Petitioner has postulated an original form "doctrine," asserting that Justice Marshall meant that individual articles which are not melted down or torn apart should not be taxable until sold. Of course, such a postulated doctrine has no support from *Brown v. Maryland* seen in its proper perspective. The examples set forth therein are consistent with an interruption of transit to allow the importer to dispose of or use the goods and/or a time when the goods will be taxed on a nondiscriminatory basis.

Assuming, however, that there is an original form "doctrine," that Justice Marshall meant to create such a thing, and that it was consistent with his examples in the opinion (all of which the Petitioner has not shown), there is still an inconsistency which such a doctrine creates. That inconsistency is that the ending of the goods' status as an import will never take place until the goods are used or sold. In effect, the Petitioner's proposal creates no rule at all.

Courts have said that two of the ways goods may lose their immunity are by use or by sale. A third is by withdrawal from their original package and a fourth is by changing the original form. The original form postulated by the petitioner is the substance of the individual imported article itself.

The only way that the substance will purposely be changed is through use by the importer or by another after sale. Either way, it will not be the change of form which will result in taxability but some other act (use or sale). So, in actuality, Justice Marshall may as well never have said "original form" in his opinion, if we take the Petitioner's view. The difficulty with this view is that the opinion does say that. The Courts which Petitioner accuses of ignoring its "original form doctrine" are actually utilizing it. Courts which use the Petitioner's concept to retain the immunity until sale or use actually ignore the concept.

It is proper to ask just what Justice Marshall meant by "original form." Petitioner assumes that he meant an individual article's shape. But the *Brown v. Maryland* decision does not speak in terms of goods which are going to be melted down; and a far more tenable position is that the original form had reference to the collective form of the goods as shipped. By breaking up the unit of transportation the importer has shown that he is using the goods, or preparing them for use. That is the same implication carried by the opening of the shipping container. The language ". . . original form or package. . . " indicates a parrallel approach. *C. F. May v. New Orleans, supra.* holds that the original package is the *shipping* package. It is logical that if any original form "doctrine" is to be announced, it should relate to the *shipping* form of the goods. and not their identity as individual articles. The original package concept does not call for a destruction of the identity of the goods before taxability. An original form concept should not either.

It should also be noted, as observed infra, that no policy of the Import-Export Clause calls for the establishment of such a "doctrine." In fact there is every reason to refuse to establish one.

POINT 9b

THE "FLOWING" OF THE GOODS DOES NOT SUPPORT THEIR IMMUNITY

The brief for the Petitioner asserts that there should be no taxability at a point where goods "flow in" and, subsequently, "flow out" to other parties after being sold. Exactly this same logic could be asserted by the peddler, which Justice Marshall claims should be taxed. In fact, that same logic could be used by an importer who broke open his cardboard boxes in order to sort them prepatory to selling them to customers in and out of the state. Many Courts, clinging to the original package doctrine, would find such a characterization by the importer to be irrelevant. Reliance should be placed upon whether the Import-Export Clause is supported by any policy which calls for taxation and whether failure to tax causes discrimination against United States citizens and domestic producers. all never intended by the Framers.

In fact, the "flow" of wholesale distribution, referred to by Petitioner in its brief at p. 14, leads to the conclusion that the importation process has ended. It is not pro-

per in light of Constitutional policy, to hold that an importation process does not end until a retail customer has brought the product or is ready to do so. In fact, *Youngstown Sheet & Tube Co. v. Bowers, supra,* holds that the import journey is complete when the goods are being used to supply the importer's needs.

In this same vein, it makes little difference whether the importer is a retailer or wholesaler. The auctioneer in *Brown v. Maryland, supra,* was just as capable of selling large lots of goods to retailers and jobbers as he was of selling goods to the public at large. If Justice Marshall had wanted to put the distinction on that basis, he would have.

POINT 9c

THE POSITION THAT THE GOODS MUST BE IN THE HANDS OF THEIR "ULTIMATE" USER BEFORE A NON-DISCRIMINATORY TAX MAY BE APPLIED IS NOT SUPPORTED BY ANY CASE

There is little doubt that two of the many reasons for the Court's decision in *Youngstown Sheet & Tube Co. v. Bowers, supra,* were 1.) an "end" of the import journey and 2.) the holding of the goods by their "ultimate" user.

The Petitioner asserts that it ". . . imports the tires for the sole purpose of selling them. . . " (Petitioner's Reply Brief, supra at p. 3). We have already stressed the fact that in *the context of the Constitutional policy*, there is little difference between sale as a use and manufacturing as a use (cf. Hart, *supra).* The goods are no longer being treated for the purpose of getting them into the country. They are being readied for their use in both cases. The fact that interstate transportation may follow the sale in both cases only increases the similarity of the two situations. The importing process has ended (cf. Prof. Melvin G. Dakin, *The Protective Cloak of the Export-Import Clause: Immunity for the Goods or Immunity for the Process"* [1958], 19 La. Law Review 747-776). Those things should be enough to support the idea that it is the Petitioner who is the ultimate user.

This is further supported by the fact that, although logically, the Petitioner could have done without a distribution center, he choose for his own economic reason to establish one here. The goods are taken off of the trucks and out of the cargo containers, which are meant to ship the goods to the point where transportation ceases and other functions begin. Then the goods are placed in the warehouse, segregated by size. That segregation does not facilitate transportation. In fact, it inhibits it. Before the goods can be further transported, an order must be received, and the goods must be taken out of the distribution center, some of each size. Then, they must be stacked so that they comprise a unit of trans-

portation to be trucked to the buyer. While doing all these things, the Petitioner takes advantage of the services of the locality, not to further ship the goods, but to prepare them for thier "sole purpose;" i.e., sale.

POINT 9d

THE SIZE OF SHIPMENTS OR SALES SHOULD NOT DETERMINE WHETHER THE IMPORT-EXPORT PROHIBITION SHOULD APPLY

The Petitioner asserts at p. 15 of its brief, that an "individual gossamer" package cannot or should not contain 11½ to 12½ tons of tires (at 20 pounds per tire, this is approximately 2200 tires). These amici suggest that whether a unit of shipment is small or large has little to do with the reasons for imposing a Constitutional prohibition on the states. The tests suggested by *E.J. Stanton & Sons v. County of Los Angeles* (1947) 78 Cal.App.2d 181, 177 P.2d 804 equate the original form with the original package. Much of the Court's rationale in that case is the same as used by this Court in *Youngstown Sheet & Tube Co. v. Bowers supra*, There is little doubt that both cases ignore the size of the lumber and ore shipments and attempt to reconcile precedent and the facts with the policies of the Constitution.

In this case, the Petitioner has broken down the unit of shipment, whether that be the overall shipment, or

an individual truckload, and has sorted the goods, preparing them for sale. Parts of some of those units were no doubt sold on the lien date. This is also true of the boxed goods which were stored side by side with domestically manufactured boxed goods. Whether they are in boxes or not, their relationship in the sales process of the importer/distributor is the same. The distribution center of today is a new entity (cf. *Ackerman, supra).* It would seem that neither *Brown v. Maryland* nor *Low v. Austin (supra)* had these changes in mind (cf. Dakin, *supra).*

POINT 9e

THE SEA VAN SHOULD PLAY A ROLE IN THE EVIDENTIARY DETERMINATION MADE PURSUANT TO BROWN v. MARYLAND

The Petitioner has made three arguments to the effect that sea vans should not be considered while determining whether the Import-Export prohibition should apply. 1.) Sea vans should not be considered the original package because they do not have the characteristics of the kinds of containers which are normally associated with packages. 2.) Sea vans cannot be original packages because they are vehicles or instruments of commerce. 3.) Holding that a sea van is an original package is not consistent with *Brown v. Maryland.*

1.) These amici are of the opinion that holding a container is not the original package because it is big (P.B. p. 18), or because it looks like a truck (P.B. p. 19) will be unhelpful in reaching a solution which is based on the policies of the Constitution.

2.) The argument raised by *Michigan State Tax Commission v. Garment Corporation of America* (1971) 32 Mich. App. 715, 189 NW2d 72, Cert. den. 404 U.S. 992, 30 L.Ed.2d 544, 92 S.Ct. 538, is to the effect that because the cargo container is an instrument of commerce, it cannot be the original package. The implication, of course, is that an article cannot have two names. Such logic, based on labels, does not strike these amici as being helpful.

In addition, that Court holds that changing circumstances cannot change the original package "doctrine." We have already seen that this is not what Justice Marshall said. If modern technology allows the sending of a complete unit of goods, in a protective case, directly from manufacturer to the domestic entity which buys them, without unloading, then it would seem that there is a significant change in the kind of evidence required to show that the importation process has ended and a domestic process has begun (cf. Dakin, *supra).*

It is the container of the unit of shipment which is the original pacakge (*C. F. May v. New Orleans, supra).*

Courts have not been reluctant to emphasize this. The term "original package" is applied to a bundle . . .

> "packed with some commodity with a view to its safety and convenient handling in transportation. . . . It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer." (*Cook v. Marshall County* [1903] 119 Iowa 384, 93 NW 372, aff'd 196 U.S. 261, 49 L.Ed. 471, 23 S.Ct.233.) (cf. *E. J. Stanton & Sons v. Los Angeles County, supra.)*

E. J. Stanton & Sons v. Los Angeles County, supra also looks toward changes in commerce as changing circumstances sufficient to alter rulings. As we have seen this is entirely consistent with Justice Marshall's evidentiary approach.

The California Supreme Court has accepted this approach. It has determined that cargo containers are evidence of the end of the import process (*Volkswagen Pacific, Inc. v. City of Los Angeles, supra).* The Petitioner's citation of *Michigan State Tax Commission v. Garment Corporation of America, supra,* stands for the proposition that there will never be evidence other than that recognized in 1871 which will effect the prohibition. These amici are of the opinion

that such logic is unhelpful and unrelated to the policies of the Constitution.

3.) We have already seen that *Brown v. Maryland, supra,* used the package as an example of the time when the importation process was complete, the domestic commerce had begun, and when it was likely that a license tax would fall upon imported and domestic goods alike. There is nothing inconsistent between that and an evidentiary approach to cargo containers which help the Petitioner.

If this Court uses the original form and package concepts as one of the pieces of evidence to show that the goods have come to rest and are at the disposal of the owner for his benefit, it should look to withdrawal of the goods from the cargo container. Other evidence of the end of the import process is the sorting of the goods for purposes of sale; the fact that the goods must again be resorted to be sent on in interstate commerce; the fact that the owner has the goods at his disposal. All of these things are true whether the goods are in cardboard boxes or not. The original pacakge concept was never meant to prohibit this logic.

POINT 10

CONCLUSION

Not allowing taxation until actually sold to the consumer who uses the goods is subject to exactly the same objection as it was in *Woodruff v. Parham.*

> "The merchant of Chicago who brings his goods in New York [in this case abroad] and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county and city taxes; for all that he is worth is invested in goods from New York [or abroad]. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchases his goods in New York [or abroad], is exempt from taxation. If his neighbor purchases in Boston [or under present law, New York], he must pay all the tax which Massachusetts levies with equal justice on the property of all its citizens."

The lack of any countervailing policy in support of a prohibition at this stage is evident. If another state's customers are to be forever protected from paying for the services rendered by the merchant's state, which help protect and transport the goods, then they should be equally protected in interstate commerce. All the usually cited language about the Im-

port-Export Clause, "attaching" its prohibition to the article, of course, cannot change this. In any case, such language requires more, since it attaches to the article only so long as it is an import, and it is an import only until it stops being an import under various tests, and those various tests must be related to some purpose of the Import-Export Clause.

We have set forth the reasons why the Courts of the 19th Century lost track of the purposes of the prohibition while clinging to mechanical tests during an era of change. Subsequent changes in commercial practices and in transportation, including sea vans, or cargo containers, modern highways, and air freight have allowed the importer/distributor even more flexibility and have allowed him to establish, not a warehouse, but a distribution center.

Whether this Court adopts the view that the import process has ended (see Dakin, *supra)* or that imposts and duties are not taxes (see Powell, *supra*), or that the prohibition ceases when the goods come to rest and are available to the owner (see *Minnesota v. Blasius, supra*) or that *Youngstown Sheet & Tube Co. v. Bowers, supra,* applies to this case (see Hart, *supra*), it will be doing so with a view toward the policies of the Constitution. The discrimination against the residents and United States manufacturers and distributors was never intended by the Framers or Justice by Marshall. That discrimination should be ended, and the ability of the states to levy uniform taxes should be restored.

There is no policy of the Constitution which prohibits ending these wrongs.

Respectfully submitted,
JOHN H. LARSON ,
Los Angeles County Counsel

JAMES DEXTER CLARK,
Deputy County Counsel

and Attorneys of Counsel

Attorneys for Amici Curiae

APPENDIX A

IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT

STATE OF CALIFORNIA

CRAIG CORP., et al.,	)	
	)	DECISION
vs.	)	PENDING
	)	2d Civ. No.
COUNTY OF LOS ANGELES, et al.	)	46268
	)	
	)	

DECLARATION OF
RONALD E. TIPPIE

1. Sea-Land Service, Inc. is a duly organized Delaware corporation, having its main offices in Elizabeth, New Jersey. Your Declarant is the Import Sales Manager for Sea-Land Service and is familiar with all the facts stated herein and if called upon as a witness could competently testify thereto.

2. Sea-Land Service, Inc. was the first fully containerized steamship company in the United States. The company began to transport cargo in containers, in vessels especially converted for such purpose, in 1956. Today there are a number of other steamship companies

that are fully containerized, however, a number of steamship companies operate both containerized and non-containerized vessels, or vessels that are mixed, i. e. part of the cargo is transported loose in the cargo hold while part of the cargo is carried in containers, either in the hold or on deck. The general term for non-containerized shipment is "breakbulk". "Breakbulk" refers to a general cargo ship containing goods which have been packaged in one manner or another, as distinguished from a bulk carrier, such as oil, grain, or ore. "Breakbulk" goods are packaged by the manufacturer or the exporter and delivered to the steamship company. They are loaded on the vessel at dockside and stored in the cargo hold in a loose fashion, placed together as tightly as possible until each cargo hold is full.

3. Containers may be referred to by a number of other names, including "cargo vans", "trailers", "cargo containers", "cargo boxes", and other similar designations. These containers are specifically designed to fit upon a chassis trailer, which is connected to a tractor or truck and thereafter moved upon the highway. Containers can also be moved by railroad or by barge. Any modern containership, such as those used by Sea-Land Service, is built with specifically designed holds. The hatch covers are larger than normal breakbulk vessels, and there are cell guides built into the holds. This allows the container to be lowered directly into its position in the hold where one container is stacked on another and held in place by the cell guides. Containers

are also stacked up to six deep on the deck of containerships and held in place by stacking frames.

4. Containers are metal enclosures, 8' x 8'6" x 20' or more in length. They are always 8' wide, which is the maximum allowable width on streets and highways. Most vans are 8'6" high. The length varies from 24 to 40 feet, depending on highway limitations, although most are now 35 or 40 feet in length. The chassis are especially built to carry a particular size or sizes of containers. Containers are placed on a chassis, are locked or clamped thereon by special devices, which must be unlocked or unfastened when the container is to be removed. Sea-Land Service owns or leases from an affiliate all its own containers and chassis. Other shipping companies generally own their containers, although in some instances they are owned by independent companies and leased to the shipping company. In no instances are the containers or chassis owned by either the importers or the exporters. Attached hereto and made a part hereof and marked Exhibit "A" are photographs of Sea-Land's newest 960 foot containership, the "Galloway", which can carry 1,085--35 and/or 40 foot containers, and typical containers of Sea-Land.

5. Containers are shipped Container Freight Station (CFS) to Container Freight Station or Container Yard (CY) to Container Yard, or a combination thereof. Goods shipped CFS to CFS are delivered by a foreign exporter to a CFS where the merchandise is loaded into

a container by the shipping company, or its agent. From the CFS the container is hauled on its chassis by a tractor to a point on the dock alongside the containership. At that point the container is lifted by a specially designed crane from its chassis and placed in the cell guides in the hold or on the deck of the containership. Upon arrival at the U.S. port the containers are removed from the containerships by specially designed cranes and placed on chassis spotted on the dock alongside the ship from where they are hauled by a tractor to a CFS, where the goods are unloaded from the container. The importer then arranges to have the unloaded goods clear Customs and delivered to his warehouse. Goods shipped CY to CY (or door-to-door) are loaded into the containers by the exporter in the foreign country, at his plant or warehouse, and the loaded container is delivered to a CY to await transfer to and loading onto a vessel by the same procedure as described above. After arrival in the United States, the container is unloaded from the ship, by the same procedure, and the container is delivered to the shipping company's CY. The importer or his agent then arranges to clear Customs and have the loaded container delivered to his warehouse or place of business. A CFS or a CY may be located immediately adjacent to the dock area or in a reasonable proximity thereto. One location may serve both purposes. Since the trucking of containers to or from the CY is not performed by the steamship company, the CY serves as a storage area where truckers bring containers to await loading on

a vessel or where containers removed from a vessel await pickup by a trucker.

6. Containers are loaded with merchandise consigned to one or more importers. In instances when containers are consigned to more than one importer, they are generally unloaded by the steamship company in a CFS. In most instances when the goods in the containers are consigned to only one importer, the container is delivered to a CY and goes to the importer's warehouse to be unloaded.

7. When the container is unloaded by the importer, or his agents, he is required to return the container itself within a given number of days, depending on the tariff rates of the particular conference line. For example, the conference line for shipments from the Far East, including Japan, Korea, and Hong Kong, provide that the containers are to be returned within 7 days after the container is unloaded from the ship. Thereafter, a demurrage charge is imposed of $10.00 per day for the first five days and $15.00 per day thereafter. The demurrage on a refrigerated container is $25.00 per day, after 5 days.

8. Upon arrival at its destination, the general procedure for a containership is to unload as quickly as possible, and the containers are placed on the dock or CY. Sea-Land owns or leases from an affiliate all chassis used by it, and upon discharge of the vessel each container is placed upon a chassis and delivered to the CFS unloading or to the CY for delivery to the

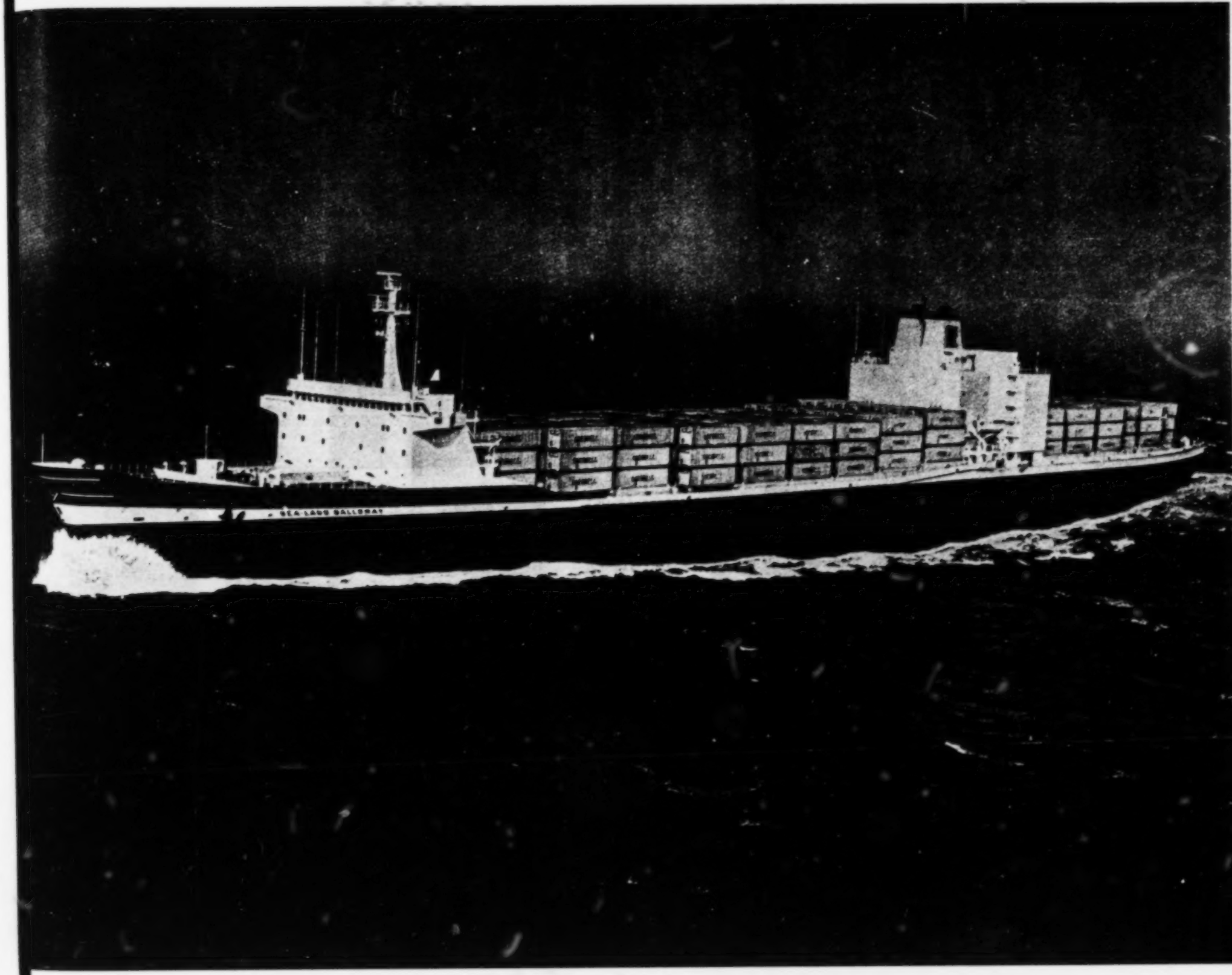
importer. The vessel itself is unloaded as quickly as possible. Unloading and loading of a containership usually takes less than twenty-four hours, and the same containers will not, under normal circumstances, be reloaded on that ship, but will be either delivered to the importer through the CY or unloaded at the dock.

9. The trend throughout the United States shows a vast increase in the use of containers for the shipment of all goods moving in international trade, which because of size, weight, and value can be placed and carried in containers. Attached hereto and made a part hereof and marked Exhibit "B" is a schedule from the Port of Long Beach showing the increases in general cargo shipment as compared to containerized shipment. Ten years ago container shipments through the Long Beach Harbor constituted less than 4% of the total general cargo tonnage, as compared to 1973 when shipment by containers represented almost 50% of the total general cargo tonnage. The expected trend in the future is for further dramatic increases.

I declare, under penalty of perjury, that the foregoing is true and correct.

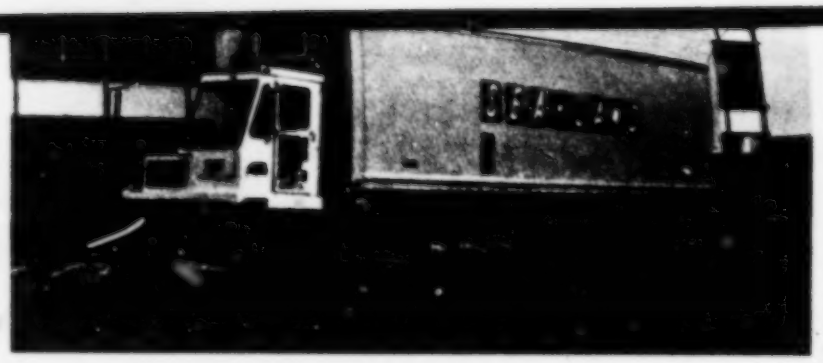
Dated: August 1, 1974, at Long Beach, California.

/s/ Ronald E. Tippie
Ronald E. Tippie


SEA LAND GALLORAT

DRY CARGO CONTAINER

	EXTERIOR LENGTH	EXTERIOR WIDTH	EXTERIOR HEIGHT	INTERIOR LENGTH	INTERIOR WIDTH	INTERIOR HEIGHT	DOOR OPENING WIDTH	DOOR OPENING HEIGHT	CUBIC CAPACITY
DRY CARGO (20')	35'0"	8'0"	8'6½"	34'7"	7'8½"	7'10⅝"	7'6"	7'8⅝"	2097 cu ft
	10.68 m	2.43 m	2.59 m	10.54 m	2.34 m	2.39 m	2.27 m	2.30 m	59.3 cu m
(A-40')	40'0"	8'0"	8'6½"	39'7"	7'8½"	7'10⅝"	7'6"	7'8⅝"	2401 cu ft
	12.19 m	2.43 m	2.59 m	12.06 m	2.34 m	2.39 m	2.27 m	2.31 m	68.0 cu m
(B-40')	40'0"	8'0"	9'6½"	39'7"	7'8½"	8'10⅝"	7'6"	8'8⅝"	2705 cu ft
	12.19 m	2.43 m	2.89 m	12.06 m	2.34 m	2.69 m	2.27 m	2.59 m	76.5 cu m



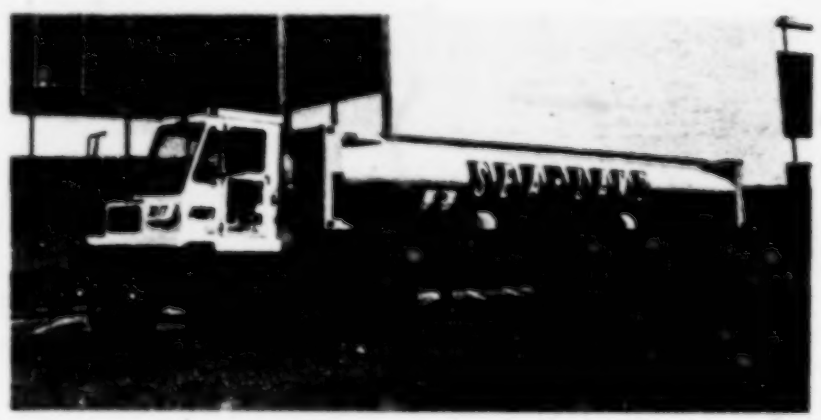
TEMPERATURE CONTROLLED A SERIES

EXTERIOR LENGTH	EXTERIOR WIDTH	EXTERIOR HEIGHT	INTERIOR LENGTH	INTERIOR WIDTH	INTERIOR HEIGHT	DOOR OPENING WIDTH	DOOR OPENING HEIGHT	CUBIC CAPACITY
35'0"	8'0"	8'6"	32'1⅛"	7'4⅛"	7'3"	7'3⅛"	7'1⅞"	1711 cu ft*
10.68 m	2.43 m	2.59 m	9.79 m	2.24 m	2.21 m	2.23 m	2.17 m	48.4 cu m

*Practical capability with air space min. is 1450 cu ft (40.8 cu m)

DRY CARGO, OPEN TOP CONTAINER

EXTERIOR LENGTH	EXTERIOR WIDTH	EXTERIOR HEIGHT	INTERIOR LENGTH	INTERIOR WIDTH	INTERIOR HEIGHT	DOOR OPENING WIDTH	DOOR OPENING HEIGHT	CUBIC CAPACITY
35'0"	8'0"	8'6"	34'7"	7'8"	7'4"	7'6"	7'6"	1970 cu ft
10.68 m	2.43 m	2.59 m	10.54 m	2.34 m	2.24 m	2.28 m	2.31 m	56.0 cu m



BULK LIQUID CONTAINER

EXTERIOR LENGTH	EXTERIOR WIDTH	EXTERIOR HEIGHT	CAPACITY
35'0"	8'0"	4'3"	Capacity (with outage) 5,250 U.S. gals.—Max. Load 5,000 U.S. gals.
10.66 m	2.43 m	1.30 m	Capacity (with outage) 21,680 Liters—Max. Load 22,728.8 Liters

IN EXACTING CIRCUMSTANCES THE INDIVIDUAL CONTAINER INVOLVED MUST BE MEASURED

BEST COPY AVAILABLE

THE PORT OF LONG BEACH

"America's most Modern Port"
P.O. Box 570 - Long Beach, California 90801 -
Telephone: (213) 437-0041 - (213) 775-3469 -
Telex: 65-6452 Portobeach Lgb

TOTAL GENERAL CARGO TONNAGE
VS
TOTAL CONTAINER TONNAGE

Period	Total General Cargo Tonnage	Total Container Tonnage
1962-63	2,386,188	88,905
1963-64	2,730,771	192,572
1964-65	2,788.655	197,122
1965-66	3,285,649	274,064
1966-67	3,993,683	299,658
1967-68	4,109,017	137,396
1968-69	4,356,886	186,764
1969-70	3,981,230	571,244
1970-71	4,603,033	1,191,053
1971-72	3,810.262	1,340,088
1972-73	6,395.847	3,054,361

Source:

Port of Long Beach General Plan 1973
Appendix V, Plate 26

/s/ Buddy Seidenberg
Buddy Seidenberg
1/2/74

EXHIBIT B

APPENDIX B

SUPERIOR COURT OF THE

STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALFRED HART COMPANY, et al.,	)	DECISION PENDING
Plaintiffs,	)	
vs.	)	No. C 83087
COUNTY OF LOS ANGELES, et al.,	)	STIPULATION OF FACTS
Defendants.	)	

The parties to this action, by their respective counsel, stipulate that the Court may find as facts in this action, at all times material hereto, without further proof, the following:

1. Plaintiffs NDC Distributors, Inc., formerly known as Alfred Hart Company, ("NDC"), Simon Levi Company, Ltd. ("Levi"). Southern Wine and Spirits of California, Inc. ("Southern"), Bohemian Distributing Company ("Bohemian"), Don W. Snyder Company ("Snyder"), and Western Liquor Distributors ("Western"), are, and at all times relevant

hereto were, corporations duly organized and existing under the laws of the State of California. Plaintiff Arizona Distributing Company ("Arizona") is, and at all times relevant hereto was, a corporation duly organized and existing under the laws of the State of Arizona and is and was a corporation engaged solely in interstate or foreign commerce. Plaintiffs Youngs Market Company ("Youngs") is, and at all times relevant hereto was, a corporation duly organized and existing under the laws of the State of Delaware and is and was duly qualified to transact business in the State of California. Plaintiff Foremost McKesson, Inc. ("Foremost") is, and at all times relevant hereto was, a corporation duly organized and existing under the laws of the State of Maryland and is and was duly qualified to transact business in the State of California.

2. Defendant County of Los Angeles, is, and at all times relevant hereto was, a policital subdivision of the State of California and defendants City of Los Angeles and City of Long Beach are, and at all times relevant hereto were, bodies politic and corporate and municipal corporations of the State of California.

3. On March 1, 1973, the tax lien date in question, plaintiffs were the owners of certain wines and spirits located in the County of Los Angeles that had been brought into said County from foreign countries and from Puerto Rico and which had a total full cash value of $14,975,411.

4. Taxes were assessed against such wines and spirits for the fiscal year 1973-1974 by defendant County of Los Angeles acting on behalf of defendants, and each of them, in an aggregate sum of $269,950.56 of which $39,966.13 was assessed on behalf of defendant City of Los Angeles and $419.52 was assessed on behalf of defendant City of Long Beach.

5. Plaintiffs have paid to the Tax Collector of defendant County of Los Angeles, acting on behalf of defendants, aggregate taxes in the amount of $269,950.56 on the dates, and in the respective amounts, set forth on Exhibit "A" attached hereto.

6. Plaintiffs Levi, Foremost, Southern, Bohemian, Snyder, Western and Arizona filed with the Los Angeles County Assessment Appeals Board, applications for equalization of 1973 assessment, which also constituted claims for refund, on the respective dates set forth on Exhibit "A" hereto, and NDC and Youngs also timely filed said applications, but no claims for refund, and paid such taxes under protest on the payment dates set forth on Exhibit "A". Said Board denied said application and claim for refund of plaintiff Arizona on October 16, 1973, and denied the remaining said applications and the respective claims for refund on December 11, 1973.

7. Thereafter, on Marcy 16, 1974, plaintiff NDC and Youngs instituted this action for recovery of ad valorem personal property

taxes in complaince with, and have otherwise met the requirements of the provisions of, Section 5138 of the California Revenue and Taxation Code. On that same date, the remaining plaintiffs instituted this action for recovery of taxes in compliance with, and have otherwise met the requirements of, the provision of Section 5103 of the Revenue and Taxation Code.

8. The taxes sought to be recovered herein are ad valorem property taxes, and plaintiffs contend that such taxes were either "Imposts" or "Duties" levied on "Imports" within the meaning of Article I, section 10, clause 2 of the United States Constitution. Defendants contend that such taxes were neither "Imposts"nor "Duties" within such constitutional provision.

9. At no time has the United States Congress "consented" within the meaning of the above-referenced constitutional provision to the assessment of any of the taxes sought to be recovered herein.

10. At no time were any of the taxes sought to be recovered herein "absolutely necessary" for the execution of "inspection laws" within the meaning of the above-referenced constitutional provision.

11. The wines and spirits against which the property tax was assessed and collected (the "Goods") were distilled or fermented in numerous foreign countries including Scotland,

France and Italy. The Goods also include spirits distilled in Puerto Rico. Attached as Exhibit "B" is a table showing the full cash value of the Goods distilled in Puerto Rico with respect to each of the plaintiffs.

12. Plaintiffs were the efficient and inducing cause for bringing the Goods into the United States and were the "importers" of the Goods. Defendants, however, do not stipulate that the portion of the Goods brought into this country from Puerto Rico are "imports" within the meaning of Article I, section 10, clause 2 of the United States Constitution. Defendants also do not stipulate that plaintiffs retained their status as "importers" of the Goods subsequent to the time the Goods were unloaded at plaintiffs' warehouses, as hereinafter described, or on March 1, 1973, the tax lien date in question.

13. Plaintiffs continuously made their own estimates of their future sales of particular brands and types of imported wines and spirits, and on this basis would place orders for the various Goods. Plaintiffs made all decisions as to the brand and amount of spirits and wines purchased. Plaintiffs placed purchase orders for the Goods with entities commonly known as exclusive United States sales agents for the foreign distillers and wineries. The United States sales agents then transmitted the purchase orders to the foreign seller where the orders were filled.

14. The foreign sellers placed the bottles comprising the Goods in rectanguler corrugated cardboard cartons or wooden cases, which typically contained twelve bottles in each carton or case. The bottles were separated with cardboard dividers and, in some instances primarily involving very costly wines, the cartons and cases were also packed with shock-insulating material such as exelsior to minimize any breakage of the bottles. The cartons and cases were then closed and sealed with either heavy sealing tape, glue, heavy staples or a combination of the above methods of closure. This packaging was in accordance with a long-standing commercial custom regarding this type of merchandise.

15. The exterior of the cartons and cases bear the imprinted name of the foreign seller and the name of the enclosed merchandise. The exterior of each carton and case was also marked with the direct import number of the plaintiff importer and/or other marks identifying the Goods to the purchase contract.

16. Following sealing of the cartons and cases, the cartons and cases were loaded into "cargo shipping containers," also known as sea vans, which were owned by the shipping companies. In some cases, loading took place at the distillery or winery. In other cases, loading took place at the shipping company's facilities which were usually located at or near the foreign port. Most cargo containers are eight feet high and eight feet wide and vary in length from twenty-four to forty feet. The

cargo containers were of two types. One type had provision for attaching a set of removable wheels, converting the containers into a truck trailer. The second type was designed to be attached to a wheeled chassis, again converting the container into a truck trailer. The second type could also be attached to special railroad flat cars for movement by rail. The cargo containers, with removable wheels attached or on a chassis, were then trucked to the dock for loading aboard ships. The wheels or the chassis were removed, the cargo containers lifted aboard the ships by large cranes, and stacked on the ships for transportation to the United States. In some cases, the cargo containers would be placed in the holds of ships specially designed to carry them.

17. All shipments were made to plaintiffs F.O.B. foreign port. Plaintiffs are indicated as the importer of record on United States Customs documents. Plaintiffs were responsible for procuring marine risk insurance on the Goods for the shipment and for paying ocean freight charges before the Goods were off-loaded in Los Angeles. Plaintiffs were not responsible for, nor did they obtain, any type of insurance with respect to the cargo containers. All shipping documents and documents of title to the Goods were delivered to plaintiffs, or their agents, prior to arrival of a shipment in the United States.

18. Upon arrival of a ship at the local port in the United States, plaintiffs' agents,

custom house brokers, would deliver the documents of title to the shipping company and complete the required United States customs forms. In almost all instances, the Goods were delivered "in bond," that is they remained under the exclusive control of United States Customs officials. The cargo containers were removed from the ships and wheels or chassis were attached to the cargo containers. The wheels or chassis were owned by independent common carriers. The common carriers were required to be bonded by the United States Customs Service, and could deliver the Goods only to a United States Customs Bonded Warehouse. The carriers would issue receipts for the Goods to both the Customs officials and plaintiffs' custom house brokers. The truck trailers then transported the Goods to United States Customs Bonded Warehouse ("Bonded Warehouses") located on plaintiffs' properties. When the Goods arrived, a United States Customs official was present and assumed exclusive supervision and control over the unloading of the Goods. The cartons and cases were removed from the cargo containers under his supervision, placed on pallets and then transported into the United States Customs Bonded Warehouse. During the unloading, the Customs official counted the cases and otherwise reviewed the quantities to confirm that the Goods delivered conformed to the description in the shipping documents. After the Goods had been placed in the Bonded Warehouse, the Customs official would lock the warehouse and retain the only key. After the Goods were unloaded, the common carrier

returned the cargo containers to the shipping company for use in future shipments.

19. A United States Customs Bonded Warehouse is under the exclusive custody and supervision of a United States Customs Bureau official. It may be either a separate building or it may be a caged area in a large warehouse. In either type, the Customs official retains exclusive control over all goods located in the warehouse, and maintains in his exclusive possession the only keys to the Bonded Warehouse. At NDC and Levi the bonded warehouses were located in buildings separate from plaintiffs' main warehouses. At Southern, Snyder, Foremost and Youngs, the Bonded Warehouses were located in caged areas in plaintiffs main warehouses. Bohemian and Western did not maintain Bonded Warehouses. All Goods placed in the Bonded Warehouses were exempt from payment of certain federal excise taxes and custom duties until withdrawn from the warehouses. Such goods are commonly referred to as being "in bond." The Goods were stacked by "bond lot" while in the Bonded Warehouse. Government regulations required that bond lots be kept separate from each other. The segregation of Goods by brand as each bond lot comprised only a single brand. Goods may be withdrawn from the bonded warehouse only under the supervision and control of the Customs official. Goods were withdrawn from the Bonded Warehouses as the need arose, as more particularly described in paragraph 22 below. The federal taxes and duties were paid as the Goods were withdrawn from the Bonded

Warehouse and placed in the main warehouse. The portion of the Goods held in United States Bonded Warehouses of plaintiffs on March 1, 1973 are set forth in Exhibit "B".

20. In all instances involving Bohemian and Western and, as to other plaintiffs in a few instances, primarily dealing with wines, plaintiffs' custom house brokers would pay the federal excise taxes and duties when the Goods arrived at the local port of entry. The cargo vans were unloaded in a like manner and delivered to a common carrier, which transported the Goods to plaintiffs' warehouses. These Goods were then unloaded and stacked by brand in the non-bonded portion of plaintiffs' warehouses. No United States Customs Bureau supervision was required.

21. The cartons and cases of wines and distilled spirits comprising the Goods could all feasibly have been shipped to the United States without the use of cargo containers. In some instances, plaintiffs imported wines and distilled spirits into the United States "break-bulk" under a procedure in which the cartons and cases were loaded individually onto ships in the foreign port through the use of pallets or slings and stored in the ships' holds. Plaintiffs were not responsible for, nor did they obtain, any type of insurance with respect to any pallets, slings or other equipment utilized in shipping break-bulk cartons and cases. These Goods upon arrival into the United States were unloaded in the same manner, delivered to the common carrier,

transported to plaintiffs' facilities and stored either "in bond" or in the non-bonded portion of plaintiffs' warehouses as described above. Pallets and slings may or may not be returned to the shipper for use in future shipments. Plaintiffs also on occasion imported wines and distilled spirits into the United States in shared cargo containers which also contained Goods being imported by other importers. Such imported Goods were also delivered to plaintiffs' warehouses and stored as described above.

22. Goods were withdrawn from the Bonded Warehouses from time to time to meet plaintiffs' inventory needs in the non-bonded portion of the warehouses. Upon removal from the Bonded Warehouse, the Goods were moved by fork lift truck to the main warehouses. Individual bond lots usually remained in the Bonded Warehouses for periods of from 1 to 12 months. Occasionally, low volume Goods would remain in the Bonded Warehouses for periods of up to 24 months. Once Goods were removed from the Bonded Warehouses and placed in the main warehouse, they and the non-bonded goods remained for periods of from 1 to 12 months prior to sale, with the usual period averaging approximately 3 to 4 months. In the main warehouse, the Goods were stacked in their original cartons and cases according to brand and bottle size, in those instances in which more than one size of a particular brand was in stock. The main warehouses contained both imported Goods withdrawn from the Bonded Warehouses and domestic wines and spirits which were also stacked in unopened

cartons and cases according to size and brand. There was no area of the warehouse devoted exclusively to domestic or imported merchandise, but the stacks of each brand, whether domestic or imported, were kept physically separate from each other. The cases and cartons were stacked so that the identifying case and carton markings were clearly visible.

23. The plaintiffs' main warehouses contained separate areas from which orders for less than full cartons or cases were filled. These areas were commonly termed "bottle rooms." These areas were not physically separate rooms, but were comprised of "speed racks," tilted metal frame racks with rollers allowing merchandise to move to the end of the rack by gravity power. The speed racks were filled with opened cartons and cases. The racks faced each other with a working area in the center. Usually, a special warehouseman was assigned to work in the bottle room only. Plaintiffs did not claim immunity from tax for any of the opened Goods in the bottle rooms.

24. Orders for full case or carton quantities were filled from plaintiffs' main warehouses. The various brands in unopened cases and cartons in each order were assembled on a shipping dock for loading on trucks. Plaintiffs usually delivered orders in trucks owned by or leased to plaintiffs. In isolated instances involving shippings over long distances, the orders were delivered by common carrier trucking companies.

25. Plaintiffs maintained computerized inventories of Goods in both the Bonded Warehouse and the main warehouses. As the Goods were sold and invoices issued, the information on the invoices was fed into the computer thereby providing plaintiffs with current inventory information. Physical inventories were made monthly and compared with the computer inventories.

26. Plaintiffs' customs consist of liquor stores, restaurants, grocery chains and other holders of retail wine and spirit licenses.

27. Plaintiffs maintained staffs of salesmen who called on customers at their business. Orders taken by the salesmen were then telephoned to the plaintiffs' warehouses for filing and shipment. Occasionally, customers would pick up merchandise themselves in sales referred to as "cash and carry."

28. All plaintiffs, with the exception of Arizona, sold to customers almost all of which were located in Southern California. With the exception of Arizona, plaintiffs made only isolated sales outside California.

29. Plaintiff Arizona made no sales to customers located in California. All Goods belonging to Arizona were taxed when in either a public Bonded Warehouse or a Bonded Warehouse owned and operated by Crescent Warehouse Company at the Port of Los Angeles. Arizona utilized Bonded Warehouse facilities in Los Angeles County because it did not operate

a Bonded Warehouse in Phoenix, Arizona, and no public Bonded Warehouse facilities were available. Goods were withdrawn by Arizona from the Bonded Warehouses in Los Angeles from time to time and shipped to Arizona by independent common carrier or Arizona's own truck to meet its inventory requirements. During the past year, a public warehouse operator in Arizona opened a U.S. Customs Bonded Warehouse and Arizona moved all Goods from Los Angeles Bonded Warehouses to such Bonded Warehouses. Arizona no longer utilizes any Los Angeles Bonded Warehouses for storage of any imported merchandise.

30. On March 1, 1973, plaintiffs, as desribed above, held (a) in their Bonded Warehouses, wines and distilled spirits in their original unbroken cartons and cases either imported by them into the United States through the use of cargo containers containing only plaintiffs' Goods or imported by them into the United States "Break-bulk" or in cargo containers shared with importers, and (b) in the non-bonded portion of their warehouses, wines and distilled spirits in their original unbroken cartons and cases either imported by them into the United States through the use of cargo containers containing only plaintiffs' Goods or imported by them into the United States "break-bulk" or in cargo containers shared with other importers. None of said imported wines and distilled spirits were, or ever had been, subject to any security interest or other lien held by a third party. The Los Angeles County Assessor assessed

the taxes, which are the subject of this action, against said wines and distilled spirits imported into the United States through the use of cargo containers containing only plaintiffs' Goods. The Assessor granted the immunity for said wines and distilled spirits imported into the United States "break-bulk" or in cargo containers shared with other importers.

31. On March 1, 1973, none of the Goods had been sold or otherwise transferred by any of the plaintiffs, except as hereinafter described. Western is the sole exclusive importer of Seagrams V.O. into Southern California. Bohemian owns all of the issued and outstanding capital stock of Western and Snyder. On March 1, 1973, Snyder and Bohemian held in their warehouses in the original unbroken cartons Seagrams V.O. having respective full cash values of $510,708.66 and $381,753.20, which had been transferred to them by Western. All such intercompany transfers were at a price equal to the net cost paid for such Goods by Western.

Dated: June 2, 1975

LATHAN & WATKINS
Donald P. Newell
John J. Clair, Jr.

By /s/ Donald P. Newell
Donald P. Newell
Attorneys for Plaintiffs
Alfred Hart Company, et al.

JOHN H. LARSON, COUNTY COUNSEL
and JAMES DEXTER CLARK

By /s/ James Dexter Clark, Deputy
James Dexter Clark, Deputy
Attorneys for Defendants County
of Los Angeles, City of Los
Angeles and City of Long Beach